CHILD ABDUCTION PREVENTION ACT AND THE CHILD OBSCENITY AND PORNOGRAPHY PREVENTION ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 1104 and H.R. 1161

MARCH 11, 2003

Serial No. 10

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

85–642 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
JOHN R. CARTER, Texas
TOM FEENEY, Florida
MARSHA BLACKBURN, Tennessee

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California

PHILIP G. KIKO, *Chief of Staff-General Counsel*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HOWARD COBLE, North Carolina, *Chairman*

TOM FEENEY, Florida
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
MARK GREEN, Wisconsin
RIC KELLER, Florida
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia

ROBERT C. SCOTT, Virginia
ADAM B. SCHIFF, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts

JAY APPERSON, *Chief Counsel*
SEAN MCLAUGHLIN, *Counsel*
ELIZABETH SOKUL, *Counsel*
KATY CROOKS, *Counsel*
PATRICIA DEMARCO, *Full Committee Counsel*
BOBBY VASSAR, *Minority Counsel*

CONTENTS

MARCH 11, 2003

OPENING STATEMENT

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CHILD ABDUCTION PREVENTION ACT AND THE CHILD OBSCENITY AND PORNOGRAPHY PREVENTION ACT OF 2003

TUESDAY, MARCH 11, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:03 p.m., in Room 2131, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Crime, Terrorism, and Homeland Security is in session. And I don't see—Bobby, I see you are back from the last time. Mark Green is back from the last time. I don't see anybody else to welcome, but I am the newcomer on the block as far as the Chair. I did sit on the Committee as a Member. But it's good to be with this Subcommittee, a new name, Crime, Terrorism, and Homeland Security.

Today, the Subcommittee on Crime, Terrorism, and Homeland Security examines H.R. 1104, the "Child Abduction Prevention Act," and H.R. 1161, the "Child Obscenity and Pornography Prevention Act of 2003."

This Subcommittee held hearings and reported both of these bills out favorably, you will recall, last Congress. The Child Abduction Prevention Act passed the House on October 8, 2002, by a recorded vote of 390 yeas to 24 nays, and the Child Obscenity and Pornography Prevention Act passed the House on June 25, 2002, by a vote of 413 yeas to 8 nays and 1 present.

The recent wave of high-profile child abductions that has swept our Nation illustrates the tremendous need for the Child Abduction Prevention Act. An understandable helplessness has grasped the Nation as these—some have called them "monsters," and I think that may well be accurate—breach the security of our homes to steal, molest, rape, and kill our children. Action is necessary and must be immediate.

The Child Obscenity and Pornography Prevention Act is necessary to stop a proliferation of child pornography after the April 16, 2002, Supreme Court decision in Ashcroft versus the Free Speech Coalition, in which the Court found two of the definitions for child pornography in the current Federal statues to be overbroad and, therefore, unconstitutional.

Child molesters are emboldened these days, it seems to me. Sexual exploitation of children, a prime motive for kidnapping, is on the rise. When it comes to sexual exploitation, abduction, rape, and murder of children, the United States must have a zero tolerance policy. Our children are not statistics. No level of abductions is acceptable. These bills will send a clear message that those who sexually exploit, abduct, and harm children will not escape justice.

H.R. 1104, the "Child Abduction Prevention Act," strengthens penalties against kidnapping, subjects those who abduct and sexually exploit children to the possibility of lifetime supervision, aids law enforcement to effectively prevent, investigate, and prosecute crimes against children, and provides families and communities with immediate and effective assistance to recover a missing child.

H.R. 1161, the "Child Obscenity and Pornography Prevention Act of 2003," ensures the continued protection of children from sexual exploitation. In response to the Supreme Court decision, this bill narrows the definition of child pornography, strengthens the existing affirmative defense, amends the obscenity laws to address visual depiction of prepubescent children and minors, creates a new—creates new offenses against pandering, visual depictions as child pornography, creates new offenses against providing children obscene or pornographic material, provides de novo review for sentencing below the applicable range under the Federal Sentencing Guidelines, and assists law enforcement officials in investigating sex crimes against children.

Sexual exploitation and abduction of a child is a parent's worst nightmare. These bills guarantee that individuals who attempt to do harm to a child will receive severe punishment and will not slip through the cracks of the system to target other children.

Those who abduct children are often serial offenders who have previously been convicted of similar offenses and those who possess child pornography often molest children. Sex offenders and child molesters are 4 times more likely than other violent criminals to recommit their crimes. This number, this staggering number, demands attention, it seems to me, and both these bills address the problem.

Passage of the bills will also increase support for the National Center for Missing and Exploited Children, the Nation's resource center for child protection. The center assists in the recovery of missing children and raises public awareness on ways to protect children from abduction, molestation, and sexual exploitation.

I appreciate the witnesses who are with us today and look forward to their testimony, and I am now pleased to recognize the Ranking Member, my good friend from Tidewater, VA, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman, for holding a hearing on these measures before us today. I want to take this time to talk about 1161 and reserve comments for 1104 until our markup following the hearing.

Mr. Chairman, H.R. 1161 is designed as a so-called fix for last year's Supreme Court decision in *Ashcroft* v. *Free Speech Coalition*. The problem is that this fix is for a decision and it doesn't fix—it doesn't eliminate the decision. *Ashcroft* held that non-obscene, computer-generated material depicting childlike characters engag-

ing in sexually explicit activities does not constitute illegal child pornography.

Now, child pornography and obscenity are despicable and are illegal and must be banned and prosecuted. These crimes—these crimes and their severe punishments are left intact by the *Ashcroft* decision. What the Court struck down was the criminalization of computer-generated and other depictions of children in undesirable, including sexual, situations where no child was involved in making the material.

Many of us see the pornography as despicable, period. But under our laws, pornography that is not obscene and does not involve real children is just that—pornography. And whether we like it or not, pornography is not illegal. It is a category of speech that is despicable but not illegal. That would be meaningless to have a protection of free speech if we were only free to say what the Government and others want us to say and not say what others didn't want us to say. Our right of free speech would be a hollow concept.

While pornography is legal, child pornography is illegal. But to constitute child pornography, there must be a separate—a separateness from general pornography to take it and get it under the exception of free speech and expression under the Constitution. The clear distinction that has been drawn by the courts and now the Supreme Court in *Ashcroft* is that to constitute child pornography, there must be real children involved. Thus, a computer-generated image depicting childlike characters but do not involve real children does not constitute pornography any more than a movie with a 22-year-old actor who plays a role of a 15-year-old would constitute child pornography.

The law called into question in *Ashcroft* was the Child Pornography Prevention Act of 1996. The problem the Court found with the law is that, while it prohibited images that constitute child pornography, it also prohibited images that did not constitute child pornography. The Court made it clear that protected speech may not be banned as a way—as a way to ban unprotected speech. This would turn the First Amendment upside down.

The proponents of the bill believe that the Court left open the question of whether the Government can establish a sufficiently compelling State interest to justify criminalization of computer-generated images that are not obscene and do not involve real children. However, the Court made it clear in distinguishing—in discussing *New York* v. *Ferber*, 1982, stating that the law struck down records no crime and creates no victims by its prosecution. In interpreting *Osbourne* v. *Ohio*, the case reaffirms that where speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. The distribution of depictions or other depictions of sexual conduct, not otherwise obscene and which do not involve live performance or photographic or other visual reproductions involving live children, retains the First Amendment protection.

Proponents also argue that the Court did not consider the harm to real children that may occur when, through technological advances, it will become impossible to tell real children from virtual children, thereby allowing harm to real children because the Government can't tell the difference.

The Court considered this and said, "The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, is indistinguishable from the real ones. They're part of the same market and often exchanged. In this way, it is said, virtual images promote the trafficking and works produced through the exploitation of children."

"The hypothesis"—and I am still quoting from the case. "The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional computerized images would suffice."

Nor was the Court persuaded by the argument that virtual images will make it difficult for the Government to prosecute cases. As to this concern, the Court said, "Finally, the Government says that the possibility of producing images by using computer imaging makes it difficult to prosecute those who produce pornography using real children. Experts, we are told, may have difficulty saying whether the pictures were made using real children or using computer imaging. The necessary solution, the argument goes, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis—this analysis turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech."

Finally, the Government suggests that because the Court determined that it need not decide whether an affirmative offense could save an otherwise unconstitutional statute, it left off—left open the possibility, but look at what the Court said. "To avoid the force of this objection, the Government would have us read the CPPA not as a measure of suppressing speech but as a law shifting the burden to the accused to prove that the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute which allows the defendant to avoid conviction for non-possession cases by showing that the materials were produced using only lawful adults and not otherwise distributed in a manner conveying the impression that they depicted children. The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of providing—of proving his speech was not lawful"——

Mr. COBLE. Mr. Scott, would you suspend just a minute? Or are you about through? I don't want to pull—are you about finished?

Mr. SCOTT. Yes.

Mr. COBLE. Okay. Very well.

Mr. SCOTT. I have another page or so.

"The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not lawful. An affirmative defense applies only after the prosecution has begun and the speaker must prove—must himself prove, on the pain of felony conviction, that his conduct falls within the affirmative defense. In cases under CPPA, the evidential burden is not trivial. Where the defendant is not the producer of the

work, he may have no way of establishing the identity or even the existence of the actors, and if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. This statute, however, by its very words, makes illegal that which the Court says is legal."

Five Justices joined in the majority opinion. One concurred, one concurred in part and dissented in part, two dissented. With five Justices agreeing in the whole decision and only three Justices dissenting in any part, it isn't a close decision with wavering members. So, Mr. Chairman, I would hope that we would avoid the necessity for the Court's telling us again that we cannot prosecute child pornography unless real children were, in fact, involved in the production of the material unless that material is legally obscene.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Scott. I appreciate that.

Other Members of the Subcommittee will have their opening statements made part of the record.

Gentlemen, we are glad to have you all with us. As you all have been told, we try to operate within the 5-minute rule. When you see the red light appear into your face, you will not be keelhauled, but that will be a warning that we would appreciate you wrapping up. And in all fairness, we apply the 5-minute rule to ourselves as well.

So, Mr. Collins, you are going to discuss both bills, so why don't we start with you? And Mr. Feldmeier and Mr. Sullivan will speak—will address one bill each.

So, Mr. Collins, why don't you start us off? Oh, strike that. Let me introduce the witnesses more thoroughly.

Mr. Daniel Collins, Associate Deputy Attorney General with the U.S. Department of Justice; Mr. John P. Feldmeier, senior associate with Sirkin, Pinales, Mezibov & Schwartz—am I pronouncing that correctly? Close enough?—LLP; and Mr. Ronald Sullivan—Ronald S. Sullivan, Jr., director of the Public Defender Service for the District of Columbia.

Gentlemen, good to have you all with us, and, Mr. Collins, if you will commence.

STATEMENT OF DANIEL P. COLLINS, ASSOCIATE DEPUTY ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. COLLINS. Thank you, Mr. Chairman and Members of the Subcommittee. We appreciate the opportunity to be here today to present the views of the Department of Justice on the important legislation that is before the Subcommittee. H.R. 1161, the "Child Obscenity and Pornography Prevention Act," would provide much needed tools in fighting the scourge of child pornography in the wake of the Supreme Court's decision in *Ashcroft* v. *Free Speech Coalition*. H.R. 1104, the "Child Abduction Prevention Act," would greatly strengthen the Government's ability to prevent, investigate, prosecute, and punish the full range of serious violent crimes that are far too frequently committed against our Nation's children. The Department is deeply grateful to the leadership shown by the Congress, the House Judiciary Committee, and this Subcommittee in

addressing these important issues, and we look forward to working with you to advance this important legislation.

We are confident that strong anti-child-pornography legislation can and will soon be enacted into law in the current Congress. As the Administration supported H.R. 4623 last year, we continue fully to support H.R. 1161 this year. The Senate, for its part, recently enacted a revised and substantially strengthened bill, S. 151, which also received the Administration's full support. The two bills overlap very significantly in approach. We are confident that the relatively modest differences between the two bills can be readily resolved to produce a final bill that is the best that can be achieved. Our Nation's children deserve no less.

The Supreme Court's Free Speech Coalition decision invalidated two key provisions of the 1996 Child Pornography Prevention Act, one aimed at combating the problems posed by virtual child pornography and one aimed at the pandering of materials as child pornography. In striking down these provisions, the Court's decision leaves the Government in a highly unsatisfactory position. In the absence of the legislation now before the Congress, the Government cannot present cases where it cannot meet its affirmative burden of proving that the child depicted in a given image is real. Moreover, one judge has recently held that the Government must also prove beyond a reasonable doubt that the defendant actually knew that the image depicts real children and was not created through virtual imaging.

The difficulties inherent in shouldering these burdens create the potential risk that, as prosecutions become more difficult and technology advances, the result could be, to a large extent, the de facto legalization of child pornography. This intolerable situation warrants prompt legislative action. But let me also emphasize that we strongly believe that any legislation must respect the Court's decision and endeavor in good faith to resolve the constitutional deficiencies in the prior law that were identified by the Court.

The Supreme Court's decision in Free Speech Coalition specifically left open the possibility that a more narrowly tailored regulation of virtual child pornography, coupled with a broader affirmative defense, could be constitutional. The Court's opinion also leaves open the possibility of enacting additional obscenity laws. Both H.R. 1161 and S. 151 properly draw on these approaches.

H.R. 1161 would also make an important and long-overdue reform to address the growing frequency of downward departures, sentences that are below the ranges required by the Sentencing Guidelines. As I discussed at length in my testimony before this Subcommittee last year, this is an especial problem in child pornography cases.

In non-immigration cases, the rate of downward departures on grounds other than substantial assistance to the Government has climbed steadily every year for the last several years, increasing by over 50 percent in just 5 years. Moreover, the rate at which downward departures were granted in pornography cases is significantly higher than the rate for cases as a whole.

Section 12 would provide much needed reform by establishing that decisions to depart are to be reviewed under a de novo standard of review. We enthusiastically support this reform and also

urge the Subcommittee to include language that would prohibit departures on any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for downward departure.

The Child Abduction Prevention Act, H.R. 1104, is one that—the Department strongly supports the key reforms made by this legislation: preventing future crime by extending the length of supervised release terms and enhancing pretrial detention and law enforcement tools, including wiretap authority and strong sentences for repeat offenders.

I would be happy to answer any questions the Committee may have.

[The prepared statement of Mr. Collins follows:]

PREPARED STATEMENT OF DANIEL P. COLLINS

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to present the views of the Department of Justice on the important legislation that is before the Subcommittee today. H.R. 1161, the Child Obscenity and Pornography Prevention Act, would provide much needed tools in fighting the scourge of child pornography in the wake of the Supreme Court's decision in *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002). H.R. 1104, the Child Abduction Prevention Act, would greatly strengthen the Government's ability to prevent, investigate, prosecute, and punish the full range of serious violent crimes that are far too frequently committed against this Nation's children. The Department is deeply grateful to the leadership shown by the Congress, the House Judiciary Committee, and this Subcommittee in addressing these important issues, and we look forward to working with you to advance this important legislation.

The Child Obscenity and Pornography Prevention Act

I would like first to address H.R. 1161, the Child Obscenity and Pornography Prevention Act. This bill is closely modeled on a bill, H.R. 4623, that passed the House of Representatives by an overwhelming 413–8 vote last June. H.R. 4623 was endorsed by the Attorney General on May 1, 2002, immediately after its introduction, and I testified before this Subcommittee in support of the bill on May 9. Thereafter, the Administration strongly supported its passage by the full House, and the President on October 23 called upon the Senate to pass this important legislation. Unfortunately, differences between H.R. 4623 and the Senate version that was passed in November could not be reconciled before the conclusion of the 107th Congress.

We are confident that strong anti-child pornography legislation can and will soon be enacted into law in the current Congress. As the Administration supported H.R. 4623 last year, we continue fully to support H.R. 1161 this year. The Senate, for its part, recently enacted a revised and substantially strengthened bill, S. 151, which also received the Administration's full support. The two bills overlap very significantly in approach, if not always in wording. We are confident that the relatively modest differences between the two bills can be readily resolved to produce a final bill that is the best that can be achieved. Our Nation's children deserve no less.

A. The Supreme Court's decision in Free Speech Coalition

In order to explain how the two bills would strengthen our ability to fight child pornography in the wake of the Supreme Court's ruling in *Ashcroft* v. *Free Speech Coalition*, I would like first to briefly outline the decision. In *Free Speech Coalition*, the Court addressed the constitutionality of two provisions of law that had been enacted as part of the Child Pornography Prevention Act of 1996. The first was 18 U.S.C. § 2256(8)(B), which defines "child pornography" to include virtual child pornography, *i.e.*, visual depictions that *"appear[] to be"* minors engaging in sexually explicit conduct. The second was 18 U.S.C. § 2256(8)(D), which defines "child pornography" also to include materials that are pandered as child pornography—that is, visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

The Supreme Court found these two definitional provisions to be unconstitutionally overbroad. In particular, with respect to "virtual child pornography" covered by § 2256(8)(B), the Court concluded that the definition extended far beyond the traditional reach of obscenity as described in *Miller* v. *California*, 413 U.S. 15 (1973),

and thus could not be justified as a proscription of obscenity, see 122 S. Ct. at 1400–01; that *New York* v. *Ferber*, 458 U.S. 747 (1982), could not be extended to support a complete ban on virtual child pornography, *see* 122 S. Ct. at 1401–02; and that the "reasons the Government offers in support" of the prohibition of virtual child pornography were insufficient under the First Amendment, *id.* at 1405.

In particular, in defending the 1996 Act, the Government had argued that the existence of virtual child pornography threatened to render the laws against child pornography unenforceable, and that a ban on virtual child pornography, coupled with an affirmative defense allowing some defendants to prove that the material was made using only adults, struck a proper constitutional balance. Without reaching the question whether any sort of "affirmative defense" approach could be constitutional, the Court held that the affirmative defense in the 1996 Act was "incomplete and insufficient." 122 S. Ct. at 1405. In particular, the Court noted that the affirmative defense did not extend to possession offenses and that it only extended to materials produced with youthful-looking adults; materials made by using computer imaging were not eligible for the affirmative defense.

The Government had also argued that child pornography, whether actual or virtual, "whets the appetites" of pedophiles to engage in molestation. In concluding that this could not sustain the 1996 Act's virtual child pornography definition, the Court held that the Government had "shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." 122 S. Ct. at 1403. The Court held that "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.*

With respect to the "pandering" provision in 18 U.S.C. § 2256(8)(D), the Court held that the provision was overbroad because it criminalized speech based "on how the speech is presented" rather than "on what is depicted." 122 S. Ct. at 1405.

B. The critical need for legislative action

By invalidating these important features of the 1996 Act, the Court's decision leaves the Government in an unsatisfactory position that the Department believes warrants a prompt legislative response. Already, defendants often contend that there is "reasonable doubt" as to whether a given computer image—and most prosecutions involve materials stored and exchanged on computers—was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on the defendants' behalf. Moreover, as computer technology continues its rapid evolution, this problem will grow increasingly worse: trials will increasingly devolve into jury-confusing battles of experts arguing over the *method* of generating an image that, to all appearances, looks like it is the real thing. The end result would be that the Government may be able to prosecute effectively only in very limited cases, such as those in which it happens to be able to match the depictions to pictures in pornographic magazines produced before the development of computer imaging software or in which it can establish the identity of the victim. *See, e.g., United States* v. *Fox*, 248 F.3d 394, 403 (5th Cir. 2001) (Government's computer expert testified on cross-examination that there was no way to determine whether the individuals depicted even exist), *vacated*, 122 S. Ct. 1602 (2002).

As Justice Thomas noted in his concurring opinion, "if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children." 122 S. Ct. at 1406–07 (Thomas, J., concurring in the judgment). Similarly, Justice O'Connor noted in her opinion concurring in part and dissenting in part that, "given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable." *Id.* at 1409. Moreover, to avert serious harms, Congress may rely on reasonable predictive judgments, even when legislating in an area implicating freedom of speech. *See Turner Broad. Sys. Inc.* v. *FCC*, 520 U.S. 180, 210–11 (1997). We believe that Congress has a strong basis for concluding that the very existence of sexually explicit computer images that are virtually indistinguishable from images of real minors engaged in sexually explicit conduct poses a serious danger to future prosecutions involving child pornography.

There are several ways in which the current state of affairs poses a serious threat to effective enforcement of the child pornography laws. For the subcommittee's benefit, I would like to set forth in some detail the difficulties that the Department has experienced.

In *Free Speech Coalition*, Justice Thomas' concurring opinion had noted that the Government had thus far been unable to point to any specific cases in which a "computer-generated images" defense had been successful. 122 S. Ct. at 1406. That is

no longer the case. We have suffered several adverse judgments, including a partial directed verdict of acquittal, as a result of the assertion of such defenses in child pornography cases. *See, e.g., United States* v. *Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images); *United States* v. *Bunnell*, 2002 WL 927765 (D. Me. 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted); *see also United States* v. *Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted; court held that the Government must prove beyond a reasonable doubt that *the defendant knew* that the images depicted real children).

But the real effect of the Supreme Court's decision cannot be measured solely in terms of acquittals. In compliance with the Supreme Court's decision, and in the absence of the legislation now before the Congress, the Government cannot present cases where it cannot meet its affirmative burden of proving that the child depicted in a given image is real. Since the original *Free Speech Coalition* decision in the Ninth Circuit, prosecutors in that Circuit have not brought cases where they are unable to prove that the children depicted in the images are real, and that is now the case throughout the country since the Supreme Court's decision affirming the Ninth Circuit. The difficulties inherent in shouldering this burden, and the potential risk it creates to effective future enforcement, warrant prompt legislative action.

The resources required to prosecute a child pornography case today are significantly more than what was required prior to the decision. Faced with overwhelming evidence, prior to the *Free Speech Coalition* decision, many defendants chose to plead guilty and benefit from sentencing adjustments for acceptance of responsibility. Since the decision, more defendants are opting to challenge prosecutions based upon the "virtual porn" defense. Indeed, certain judges take the position that the Government must have concrete proof that a real child is involved even where there has been no specific claim by the defense of computer generation. It is likely that a number of judges will not permit the prosecution to prove that the image is real simply by relying on the image alone, without more. *See, e.g., Sims, supra* (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images as to which the Government had no evidence other than the images themselves).

Moreover, one judge has recently held that, in light of the *Free Speech Coalition* decision, the Government must also prove, beyond a reasonable doubt, that the defendant actually knew that the image depicts real children and was not created through virtual imaging. *See United States* v. *Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002).

Faced with a "virtual porn" challenge, prosecutors have several potential avenues (short of relying on the image itself alone) for proving that a child depicted in a child pornography image is real. First, prosecutors might know the identity of a particular child depicted in an image from another child sex abuse investigation. Second, prosecutors might be able to establish that a given image predates the technology at issue. Third, prosecutors might be able to present expert testimony that a given image likely depicts a real child. However, none of these avenues is without limitations—sometimes significant limitations—and the work and time involved is quite substantial.

Some child abuse investigations, here and abroad, have led to the discovery that the offender photographed the abuse and posted the photographs on the Internet. In the aftermath of *Free Speech Coalition*, law enforcement can scour the photographs seized from child pornographers to determine if one of those images (by definition of a known child) is in their collection. This approach has met with some success. However, even when investigators make a "match," the process involved in doing so is labor- and time-intensive. In addition, the Federal Rules of Evidence, barring hearsay, leave prosecutors with a very small number of witnesses who are competent to establish that the child is real. Some of these problems, encountered on a regular basis by prosecutors in the aftermath of *Free Speech Coalition*, are presented in more detail below.

Federal agents and forensic examiners are spending an inordinate amount of time on each case attempting to discern whether a known victim might be among the hundreds, thousands, tens of thousands, or even hundreds of thousands of images recovered from a single offender. This process of identification is slow, burdensome, and only sometimes successful.

Even where agents are successful at identifying one or more known victims from an offender's collection, proving that fact without hearsay is very challenging. The few known victims have been identified through other sex abuse investigations—

many of which occurred outside the United States. The non-hearsay, fact witnesses who are competent to testify that the child is real are usually limited to the law enforcement officers, the child victim, and the child victim's family. As the Subcommittee will appreciate, asking for the child victim's testimony, or that of his or her family, must be avoided at all costs because to do so would perpetuate the child's victimization. That leaves the law enforcement officers who investigated the cases. Those investigators, many of whom are outside the subpoena power of the United States, have lamented that they have been *deluged* with requests for their testimony from U.S. prosecutors. They have advised us that they are unable to satisfy all the requests they receive for their testimony.

Even defendants who are willing to plead guilty, often condition such a plea on proof by the Government that the image depicts a real minor. Thus, even when the Government knows that a child in an image was identified through a separate sexual abuse investigation, the defendants—unwilling to rely on hearsay—require the Government to produce the law enforcement witness who can personally identify the victim, before offering their plea. For example, in one case, an AUSA had to produce two witnesses—from Germany and the UK—before the defendant would plead guilty. Even in the cases where defendants are willing to plead guilty without imposing this burden on the Government and the few fact witnesses, some judges have expressed a reluctance to accept a plea in the absence of evidence that either the images depict real minors, or evidence that the defendant knew the images depicted real minors and, in at least one disturbing example, requiring proof of both.

In the absence of known victims, or in lieu of such evidence, prosecutors might prove that an image depicts a real child if they can establish that the image was in circulation prior to the time the technology for computer generation came into being. This mechanism of proof is only sometimes successful and also requires a significant commitment of time and resources. First, prosecutors will typically need to secure expert testimony regarding the date this technology was available. Experts do not always agree on a date nor on the meaning of "available." Putting that issue aside, there is currently no easily searchable database of such images. The United States Customs Service has the most extensive collection of print magazines of child pornography (obtained through seizures). Yet, many of the magazines are undated and prosecutors are left trying to find a fact witness who can establish that a particular magazine (and therefore the images displayed therein) predate a certain time period. Identifying such witnesses is difficult and not always a successful proposition. Moreover, the few people who might be competent witnesses will eventually, with the passage of time, become unavailable completely.

A third mechanism for establishing that a real child is depicted in an image of child pornography relies on the use of one or more experts. Unfortunately, this is not a simple or easy process. This avenue of proof is time-consuming for law enforcement and the experts, as well as costly. The experts on the state of technology and its availability are very few and have busy and lucrative careers. While many of these experts have gladly testified in a few trials, they do not have the time or ability to participate in more than a couple of such cases a year.

Forensic experts—those who examine a photograph and, based upon characteristics that are present or absent, opine on the likelihood of computer alteration—can span several disciplines. The disciplines involved could include computer graphics, including computer animation; graphic art; and photography. Additionally, it is not uncommon for an offender to have many hundreds or thousands of images. The cost involved in hiring experts to review and opine on large numbers of images can become prohibitive.

The vastly increased resources required to prosecute child pornography cases in the aftermath of *Free Speech Coalition* do not end with a conviction. Some sentencing hearings have turned into drawn out battles as involved as trials. While the Government's burden of proof at sentencing is lower than at trial and the Government should be able to meet its burden by relying on the photograph alone, that assumes that the defendant does not present expert testimony suggesting computer alteration. The difficulty for prosecutors lies in the fact that child pornography images are typically circulated through the Internet. The fact that the photographs are scanned, zipped, unzipped, cropped, and otherwise "altered," necessarily produces the opportunity for defense expert testimony suggesting some type of computer "alteration." Given such a challenge, the Government cannot always safely rely on the photograph alone to meet its burden, even at sentencing, that the image depicts a real child.

Sentencing enhancements that easily applied before—for distribution, depictions involving sadistic or masochistic abuse, and others—are now challenged, with defendants arguing that the Government must establish that a real child was depicted in the image upon which the sentencing enhancement is based. Upward departures

for high volumes of child pornography are likewise hotly contested, with the defendants arguing that any upward departure for the number of images must take into account only those images where the child is identified or otherwise proved to be real. In the District of Connecticut, where a Yale Professor who had video-taped his abuse of an inner city boy he was "mentoring" received an upward departure for having possessed over 150,000 images of child pornography, the prosecutor has expended significant resources responding to a challenge to the application of the upward departure because the Government allegedly did not prove that a real minor was depicted in each and every one of the over 150,000 images. While we are quite hopeful that we will ultimately succeed in safeguarding the sentence, the time expended in doing so has been substantial and likely at the expense of other child pornography investigations and potential prosecutions.

This "resource drain" comes at a particularly bad time—a time when the nation's law enforcement resources are stretched in light of terrorist threats to our national security. Moreover, the U.S. Customs Service has informed us that, as a result of *Free Speech Coalition*, "[r]esources are being diverted from investigative activities to analysis of images." The FBI and other law enforcement agencies have echoed those remarks.

Prosecutorial resources are similarly strained. For example, one AUSA recounted the "inordinate amount of time and effort" devoted to a single case where the offender was a self-admitted pedophile who had entered a guilty plea and was awaiting sentencing at the time the *Free Speech Coalition* case was decided by the Supreme Court. Since then, the defendant was allowed to withdraw his plea, and the Government has reviewed thousands of images to identify a small number of images. The prosecutor and agents spent considerable time tracking down necessary "identity" witnesses in Brazil, the UK, Texas, and Oklahoma.

In evaluating the effect of the decision, it is also important to understand that many of these cases have not reached trial in the time since the Supreme Court's decision. Continuances have been common as defense attorneys buy time to formulate "virtual" porn defenses, and prosecutors endeavor to unearth evidence of the identity of children depicted in the images, discover a match with old magazines, or identify and consult with experts.

One AUSA who has prosecuted child exploitation cases for many years and with great dedication, summarized the situation as follows:

> After talking to AUSAs in several other districts, I believe that if all the federal prosecutors had sufficient time to respond, the unanimous opinion would be that the decision in *Free Speech* has had a significant adverse impact on federal prosecutions. It has made it more difficult to charge violations and consequently disheartened many dedicated agents and prosecutors. I believe that we are just beginning to see the true impact of the opinion. This is so because the lag time between the seizure of computer systems and the analysis of evidence by the prosecutors after completion of forensics examinations has meant that systems seized before the *Free Speech* opinion are still awaiting analysis in many cases. Pre 9/11, a five or six month delay while awaiting forensics was common. Now, forensics completed in five months are "expedited." In addition, as time passes, more prosecutors and agents are beginning to appreciate the implications of the opinion.

The current situation is intolerable. Enforcement of the child pornography laws is becoming substantially more difficult, which threatens to reinvigorate this pernicious traffic and to harm more and more children.

C. How the legislation fixes the problem

For all of these reasons, inaction is unacceptable. But let me also emphasize that, while we are disappointed with the Court's decision, we strongly believe that any legislation must respect the Court's decision and endeavor in good faith to resolve the constitutional deficiencies in the prior law that were identified by the Court. We believe that both H.R. 1161 and S.151 succeed in doing that.

The Supreme Court's decision in *Free Speech Coalition* leaves open two primary means for addressing the problems presented by virtual child pornography. First, the Court specifically left open the possibility that a more narrowly tailored regulation of virtual child pornography, coupled with a broader affirmative defense, could be constitutional. In addressing the adequacy of the affirmative defense contained in the 1996 Act, the Court noted that the use of an affirmative defense could raise constitutional issues, but the Court explicitly stated that it was not holding that an affirmative-defense approach was unconstitutional:

> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First

> Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.

122 S. Ct. at 1405. As Justice Thomas correctly noted in his concurring opinion, the majority opinion thus explicitly "leave[s] open the possibility that a more complete affirmative defense could save a statute's constitutionality." *Id.* at 1407.

Second, the Court's opinion in *Free Speech Coalition* leaves open the possibility of enacting additional laws designed to more effectively prohibit obscene materials containing depictions of children. The Court concluded that, because of its breadth, the prior law was "much more than a supplement to the existing federal prohibition on obscenity." 122 S. Ct. at 1399. But it did not foreclose the possibility that supplemental legislation aimed specifically at obscene depictions of children could properly be enacted. On the contrary, the Court went out of its way to note that obscenity doctrine may give the Government greater leeway when it comes to graphic depictions of sexual acts involving very young children:

> While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.

122 S. Ct. at 1396.

H.R. 1161 and S. 151 properly draw on both of these approaches in crafting a range of complementary provisions that aim to further the Government's compelling interest in protecting children, while avoiding infringement of First Amendment rights.

Let me first address how both bills implement the "affirmative-defense" approach that was explicitly left open by the Supreme Court. Section 3 of H.R. 1161 would significantly revise the existing law's coverage of virtual child pornography by substantially narrowing the scope of the relevant definition of "child pornography" and by simultaneously expanding the affirmative defense. Section 3 of H.R. 1161 eliminates both of the problems identified by the Court in the prior affirmative defense, and more narrowly focuses the statute on the Government's core concern about enforceability. Specifically, section 3 would make at least five significant changes to the prior law:

- The definition of virtual child pornography is explicitly limited to "computer image[s]", "computer-generated image[s], and "digital image[s]." As a practical matter, it is the use of computers and digital technology to traffic images of child pornography that implicates the core of the Government's practical concern about enforceability. The resulting prohibition is one that extends, not to the suppression of any idea, but rather to uses of particular instruments, such as computers, in a way that directly implicates the Government's compelling interest in keeping the child pornography laws enforceable.
- The definition of virtual child pornography is also revised to reach only images that are "indistinguishable" from actual child pornography. Again, the idea is that the Government's core interests are implicated by the sort of materials that, to an ordinary observer, could pass for the real thing. "[D]rawings, cartoons, sculptures, or paintings"—which cannot pass for the real thing—are specifically excluded from the scope of this provision.
- The definition of "sexually explicit conduct" has been narrowed with respect to virtual child pornography. In particular, "simulated" sexual intercourse would be covered only if it the depiction is "lascivious" and involves the exhibition of the "genitals, breast, or pubic area" of any person. Notably, this change alone eliminates most of the overbreadth identified by the Court; it was the breadth of the definition of "sexually explicit conduct" that led to distracting and unhelpful arguments over whether movies such as "Traffic" and "American Beauty" were covered.
- The affirmative defense is explicitly amended to include possession offenses.
- The affirmative defense is also amended so that a defendant could prevail simply by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults.

With these changes, "'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Ferber,* 458 U.S. at 773–74 (*quoting Broadrick* v. *Oklahoma*, 413 U.S. 601, 615–16 (1973)).

Three provisions of S. 151 would, taken together, also implement the "affirmative-defense" approach to regulating virtual child pornography. As a general matter, section 3 of the bill would amend 18 U.S.C. § 2252A(c) so that the affirmative defense would apply to possession offenses and would also be available to any defendant who could show that no children were used in the production of the materials. As noted above, these were the two deficiencies that led the Supreme Court to hold that the existing affirmative defense was constitutionally inadequate. Section 5 of the bill would revise subsection "(B)" of the definition of "child pornography" in 18 U.S.C. § 2256(8); this revised subsection, when read together with a third provision, would extend to certain "virtual" materials. Specifically, proposed section 2256(8)(B) would define as proscribed child pornography any materials whose production "involves the use of an identifiable minor engaging in sexually explicit conduct." Section 5(4) of S. 151 would, in turn, amend the existing definition of "identifiable minor" in section 2256(9) so that it would include a "computer image, computer generated image, or digital image" that "is of, or is virtually indistinguishable from that of, an actual minor" and depicts "sexually explicit conduct" as narrowly defined in a new subsection, 18 U.S.C. § 2256(2)(B). The definition of "virtually indistinguishable" in S. 151 is essentially the same as the definition of "indistinguishable" in H.R. 1161. *Compare* S. 151, § 5(4) (adding 18 U.S.C. § 2256(10)) *with* H.R. 1161, §§ 5(a)(1) (adding 18 U.S.C. § 1466A(c)(4)), 3(a) (amending 18 U.S.C. § 2256(8)(B) (borrowing the definition of "indistinguishable" in new section 1466A). The special, narrowed definition of "sexually explicit conduct" that applies to the virtual pornography prohibition in S. 151 is likewise essentially identical to its counterpart in H.R. 1161. Compare S. 151, § 5(2)(D) (adding new 18 U.S.C. § 2256(2)(B)) with H.R. 1161 § 3(b) (adding new 18 U.S.C. § 2256(2)(B)).

Thus, with respect to each of the five key changes that I outlined above, the substance of the two bills is completely identical. There thus is now a clear consensus as to the precise substantive changes that are necessary to implement the "affirmative defense" approach, and that is why the Administration has been pleased to strongly support both bills. As a strictly technical matter, we believe that the language and placement of the relevant provisions in the House bill is simpler and cleaner, and we would recommend that you retain that formulation. We would be pleased to provide technical comments on this issue to the Subcommittee's staff.

Let me now address how the two bills would strengthen the ability to go after obscene depictions of children. H.R. 1161 and S. 151 each contain two provisions that seek to implement this approach.

First, both bills would enact a specific prohibition of "obscene" materials that depict minors engaged in sexually explicit conduct. Section 5 of H.R. 1161 would add a new section 1466B to title 18 that would prohibit "obscene" materials "of any kind, including a drawing, cartoon, sculpture, or painting" that "depicts a minor engaging in sexually explicit conduct." No real children need be depicted and no real children need have been used in the production. Notably, proposed § 1466B would explicitly incorporate the stricter penalties applicable to child pornography, and section 5(b) of the bill would likewise require application of the guidelines applicable to child pornography, which are substantially more strict than those applicable to obscenity offenses generally. Section 6 of S. 151 would likewise add a new provision, 18 U.S.C. § 2252B(a)(1), that would prohibit "obscene" materials "of any kind, including a drawing, cartoon, sculpture, or painting" that "depicts a minor engaging in sexually explicit conduct." And like H.R. 1161, S. 151 includes a specific directive (§ 6(c)) that would explicitly incorporate the stricter penalties applicable to child pornography. These corresponding provisions of the two bills are thus identical in purpose and effect.

Second, both bills contain a second provision that would regulate a narrowly defined class of materials as proscribable obscenity *without* requiring, in every case, a case-by-case examination of all three of the elements of the *Miller* test for obscenity.

Section 5 of H.R. 1161 would add a new section 1466A to title 18. Proposed § 1466A would create a new obscenity offense that would generally prohibit the production, distribution, or possession of visual depictions of *pre-pubescent* children engaging in sexually explicit conduct, whether real or virtual. An individualized assessment of the *Miller* factors would not be required in every case. The penalties imposed on this subset of obscene materials would be the same as those for proposed § 1466B, discussed above.

By creating a new provision that more narrowly focuses on pre-pubescent materials, proposed § 1466A takes into account the fact that the *Free Speech Coalition* Court relied entirely on post-pubescent materials in finding that the prior law was substantially overbroad. Moreover, the Court specifically noted in its opinion that the age of the child depicted was an important consideration in determining wheth-

er a particular depiction was constitutionally unprotected obscenity: "Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not." 122 S. Ct. at 1396.

Congress may reasonably conclude that the very narrow class of materials covered by proposed § 1466A are the sort that would invariably satisfy the constitutional standards for obscenity set out in Miller, and that such materials therefore may be fully proscribed because they are constitutionally unprotected obscenity. The narrow class of images reached by proposed § 1466A are precisely the sort that appeal to the worst form of prurient interest, that are patently offensive in light of any applicable community standards, and that lack serious literary, artistic, political, or scientific value in virtually any context. Once again, to the extent that there is any residual overbreadth, it is not substantial and may be satisfactorily addressed through case-by-case adjudication.

Section 6 of S. 151 would enact a new § 2252B(a)(2) that would effectively proscribe any depiction that is, or appears to be, a minor engaging in certain specified graphic sexual activities and that "lacks serious literary, artistic, political, or scientific value." Thus, whereas the House bill would not require, in all cases, a case-by-case analysis of the *Miller* factors with respect to a narrowly defined class of "pre-pubescent" sexually explicit materials, the Senate bill would require a case-by-case analysis of only *one* of the *Miller* factors with respect to a somewhat more broadly defined class of materials that includes post-pubescent materials.

These approaches are, conceptually, not very far apart from one another. The most conservative approach would be to adopt the House bill's narrower definition of the subset of materials that would be subject to a "per se" obscenity approach and to combine it with the Senate bill's requirement of a case-by-case determination with respect to the third *Miller* factor, *i.e.*, whether the material lacks serious literary, artistic, political, or scientific value. On the other hand, it may seem unwarranted to require a jury to ask whether, for example, a graphic depiction of the sexual abuse of a five-year-old has "literary, artistic, political, or scientific value." The question is a close one, and while the Department has previously expressed its preference for the House formulation, we can and would support whichever of the two provisions is included in the final legislation.

Notably, the obscenity provisions of both bills would extend their prohibitions to simple possession of the obscene materials at issue. We strongly endorse this feature of both H.R. 1161 and S. 151. We do not believe that these provisions would be unconstitutional, notwithstanding the Supreme Court's 1969 decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), which held that a State could not constitutionally criminalize the simple possession of obscenity in the privacy of a person's residence. Several points are worth noting in this regard:

- In *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the Court held that *Stanley* does not apply to the possession of child pornography involving actual children, and the Court specifically cautioned that "*Stanley* should not be read too broadly." *Id.* at 108.
- The Court has explicitly rejected the contention "that [because] *Stanley* has firmly established the right to possess obscene material in the privacy of the home[, . . .] this creates a correlative right to receive it, transport it, or distribute it." *United States* v. *Orito*, 413 U.S. 139, 141 (1973). The lower courts have likewise extended the rationale of *Orito* to, in effect, cover "home receipt" situations under several federal obscenity and child pornography laws. *See, e.g., United States* v. *Hurt,* 795 F.2d 765 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *United States* v. *Kuennen*, 901 F.2d 103 (8th Cir.), *cert. denied*, 498 U.S. 958 (1990); *United States* v. *Hale*, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). Virtually all "possession" cases that would be prosecuted under the House and Senate bills will involve obscene materials that the defendant almost certainly received from someone else, and it makes little sense from a constitutional perspective to require the Government to go through the mechanics of proving that the materials possessed by the defendant were unlawfully received.
- The possession prohibitions in the House and Senate bills are *not* premised "on the desirability of controlling a person's private thoughts." *Stanley*, 394 U.S. at 566. Instead, they are premised on the Government's substantial and legitimate interest in preventing such obscenity from "entering the stream of commerce" in the first instance, see *Orito*, 413 U.S. at 143. The vast majority of the materials in question are computer-generated images that are easily susceptible of being transmitted by possessors over interactive computer networks to others seeking the same sorts of images. This fundamentally distinguishes a possession case under the proposed bills from *Stanley*.

- Recent evidence establishing a significant causal link between possession of child pornography and molestation (or other sex crimes) also provides an additional basis for the prohibition on possession of such obscene materials.

In addition to these various provisions aimed at remedying the Supreme Court's invalidation of the virtual child pornography prohibition in 18 U.S.C. § 2256(8)(B), both H.R. 1161 and S. 151 contain new provisions designed to replace the "pandering" provision (18 U.S.C. § 2256(8)(D)) that was also struck down by the Court.

Section 4 of H.R. 1161 creates a new "pandering" provision that avoids the problems of the prior law. The Court sharply criticized the fact that prior law criminalized *materials* based on how they were marketed. Section 4, by contrast, would regulate the *marketing* itself by enacting a comprehensive prohibition on any offer to sell or buy "real" child pornography, *without* having to prove that any material was ever produced. This section presents no constitutional difficulty. There is no constitutional limitation on the ability of the legislature to establish inchoate offenses (attempt, conspiracy, solicitation, etc.) respecting conduct that is aimed at unlawful transactions. For example, offering to provide or sell illegal drugs can be criminalized, even where the offeror does not actually have such drugs in hand.

Section 3 of S. 151 would likewise enact a new prohibition on the advertising or promotion of any material "in a manner that reflects the belief, or is intended to cause another to believe, that the material or purported material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct." Once again, this provision is in all relevant respects identical in substance to the comparable provision of H.R. 1161, and the Department has been pleased to support both provisions. For entirely technical reasons, we think that the House version is preferable, because it is more clearly written to make clear that the offense is not subject to an affirmative defense.

Both bills also contain provisions aimed at prohibiting the use of sexually explicit materials to facilitate offenses against minors. Section 6 of H.R. 1161 would criminalize the knowing use of, *inter alia*, obscenity, child pornography, or "indistinguishable" virtual pre-pubescent pornography in connection with the commission of certain specified offenses against minors. Section 6 of H.R. 1161 would also enact a straightforward prohibition on showing any such materials to children. In turn, section 3 of S. 151 would prohibit the use of child pornography or virtual child pornography "for purposes of inducing or persuading a minor to participate in any activity that is illegal." Both of these are strong provisions that the Department has vigorously supported. The House provision is probably, on balance, more expansive in its reach, and to that extent may be preferable.

The remaining sections of H.R. 1161 and S. 151 would make a number of other important changes to strengthen the law in this vital area. Both bills contain provisions to strengthen penalties for repeat offenders. Both bills provide for strengthening and clarifying the existing reporting requirements applicable to internet service providers. Both bills would strengthen the extraterritorial application of child pornography laws. Both bills would authorize the use of wiretaps, where appropriate, to investigate child pornography and the sexual abuse of minors.

H.R. 1161 contains certain additional provisions not found in the Senate bill. In particular, section 12 of the bill would enact long-overdue reforms to address the growing frequency of "downward departures" from the Sentencing Guidelines. This is especially a problem in child pornography cases.

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission has promulgated "guidelines" that determine the sentencing range that should govern a particular case; a "departure" is a decision by the sentencing court that, for one reason or another, the case should be sentenced outside the prescribed range. Although the Guidelines continue to state that departures should be "rare occurrences", they have proved to be anything but that. The rate of downward departures on grounds other than substantial assistance to the Government has climbed steadily every year for the last several years. The rate of such departures in non-immigration cases has climbed from 9.6% in FY 1996 to 14.7% in FY 2001—an increase of over 50% in just five years. (Immigration cases are excluded because they have unusually high rates of downward departure due to "fast-track" programs established in many districts.) The following table illustrates this disturbing trend:

TABLE A

FREQUENCY OF DOWNWARD DEPARTURES
Percentage of cases in which downward departure is granted on grounds other than substantial assistance to the Government

FISCAL YEAR	All Non-Immigration Offenses*
1996	9.6%
1997	10.3%
1998	11.1%
1999	13.0%
2000	13.5%
2001	14.7%

* Immigration offenses excluded because many departures are pursuant to "fast-track" programs.

By contrast, *upward* departures are virtually non-existent. During the same time period from FY 1996 to FY 2001, the upward departure rate has held more or less steady at around 0.6%. In FY 2001, the ratio of downward departures to upward departures was a remarkable 33:1. This was triple the already lopsided 11:1 ratio in FY 1996.

Moreover, the rate at which downward departures are granted in sexual abuse and pornography cases has typically far exceeded the already-high rate of downward departures generally. *See* Table B. In the six years from FY 1996 to FY 2001, non-substantial-assistance *downward departures were granted, nationwide, in almost 20% of sexual abuse cases and in 21% of pornography and prostitution cases*. This well exceeds the national average of 12% for non-immigration offenses during the same period. Anecdotal reports from prosecutors suggest (as does the law of averages), that the rate of downward departure for these offenses in many districts is even higher than 20%.[1] And although the downward departure rate for kidnapping is, over the same six-year period, close to the average for other non-immigration offenses, it has exceeded that average in three of the last six years.

[1] Moreover, these numbers may be understated. For example, although the Central District of California (one of the nation's largest districts) reports only a 10.8% non-substantial-assistance downward departure rate for all offenses in FY 2001, that is based only on the limited subset of cases that were reported to the Sentencing Commission. The Commission's annual report indicates that departure information is missing from a whopping 58% of cases sentenced in the Central District of California during FY 2001.

TABLE B

FREQUENCY OF DOWNWARD DEPARTURES

Percentage of cases in which downward departure is granted on grounds other than substantial assistance to the Government

FISCAL YEAR	Sexual Abuse	Pornography/ Prostitution	Kidnapping/ Hostage-Taking	All Non-Immigration Offenses*
1996	22.3%	16.6%	12.1%	9.6%
1997	18.4%	23.3%	9.5%	10.3%
1998	17.2%	23.3%	19.5%	11.1%
1999	18.9%	22.6%	9.2%	13.0%
2000	24.6%	20.6%	15.2%	13.5%
2001	16.5%	18.9%	9.8%	14.7%
WEIGHTED AVERAGES	19.6%	21.0%	12.3%	12.2%

* Immigration offenses excluded because many departures are pursuant to "fast-track" programs

Moreover, the extent of the downward departures in these cases also well exceeds the average for other cases. See Table C. Whereas the median percentage decrease in a sentence, due to downward departure, has generally hovered around 40% for all offenses, the median percentage decrease for sexual abuse offenses has been closer to 60%, and for pornography offenses has ranged between *66.7% and 100%.*

TABLE B

EXTENT OF DOWNWARD DEPARTURES

Median percentage decrease from Guideline minimum sentence

FISCAL YEAR	Sexual Abuse	Pornography/ Prostitution	Kidnapping/ Hostage-Taking	All Offenses
1997	-56.4%	-100.0%	-40.0%	-34.8%
1998	-55.0%	-86.4%	-27.3%	-35.1%
1999	-59.9%	-72.7%	-25.9%	-40.0%
2000	-52.6%	-67.6%	-19.6%	-40.0%
2001	-63.3%	-66.7%	-53.8%	-40.0%

These statistics demonstrate that the Sentencing Guidelines in this area are not being adhered to and that these crimes are not being taken seriously. Downward departures have been especially and egregiously abused in this area. And some of the grounds of departure employed in such cases have been as creative as they are outrageous: for example, a 5'11", 180-lb. child pornography defendant—who had accessed over 1,300 child pornography pictures and begun an Internet correspondence with a 15-year-old girl in another state—was granted a 50% downward departure in part on the ground that he would be "unusually susceptible to abuse in prison". *See United States* v. *Parish,* 308 F.3d 1025 (9th Cir. 2002) (rejecting Government's appeal and affirming the sentence).

Much of the damage is traceable to the Supreme Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996). In *Koon*, the Court interpreted the Sentencing Reform Act to require appellate courts to apply a highly deferential standard of review to departure determinations by sentencing judges. The Court also disapproved the practice whereby appellate courts had previously determined that certain grounds of departure were impermissible. Instead, the Court held that any factor

not explicitly disapproved by the Sentencing Commission (or by statute) could serve as a ground for departure, in an appropriate case as determined by the district court in its discretion.

Under *Koon*, judges who dislike the Sentencing Reform Act and the sentencing guidelines have significant discretion to avoid applying a sentence within the range established by the Commission, and it is difficult for the Government effectively to appeal in such cases. Consequently, the rates of downward departure have steadily accelerated since *Koon*. Moreover, *Koon*'s expansion of the permissible grounds of departures had led to a growing trend of increasingly vague grounds of downward departure. Thus, in FY 2001, departures on such vague grounds as "general mitigating circumstances" accounted for over 20% of all downward departures.

Section 12 of H.R. 1161 would provide much-needed and long-overdue reform by establishing that decisions to depart from the guidelines are to be reviewed under a de novo standard of review. To that extent, *Koon* would be explicitly overruled. While we enthusiastically support this measure, we do not believe it goes far enough. We strongly urge the Subcommittee to include appropriate language that would overrule *both* of the key holdings in *Koon*. Specifically, the bill should include language that would prohibit departures on any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for a downward departure. In doing so, the bill would effectively overrule *Koon* on this point as well. Since their inception, the guidelines have stated that a departure on a ground not specifically mentioned in the guidelines should "be highly infrequent." But since *Koon*, such departures have proved to be far from infrequent: in FY 2001, they amounted to over 20% of all downward departures. This abuse of what is intended to be, at most, a rarely used device strongly confirms that the device should be eliminated.

We would request, however, that section 12(b) be deleted from H.R. 1161. This section would require an individualized report to the House and Senate Judiciary Committees every time a court imposes a non-substantial-assistance downward departure, to be followed by a second report explaining whether the Government has decided to appeal. This provision would impose substantial and unwarranted burdens upon the Department of Justice, and runs counter to longstanding and important traditions that counsel against legislative interjection into individual criminal cases. Moreover, the statutes already impose an individualized reporting requirement on federal judges, but the information is sent, not to the Congress directly, but to the Sentencing Commission, which must then provide aggregate reports to the Congress. 28 U.S.C. § 994(w). We recognize that there may be deficiencies in the operation of the current reporting system, and we would be pleased to work with the Subcommittee in identifying ways in which to improve it.

We support section 13 of H.R. 1161, which adds certain child pornography offenses as wiretapping predicates. We recommend that the formulation of this proposal in section 201(a) of H.R. 1104 be used instead, because it includes additional sex offenses that should be incorporated as wiretapping predicates. The references to the proposed new child obscenity offenses in section 13 of H.R. 1161, 18 U.S.C. §§ 1466A and 1466B, are, strictly speaking, not necessary so long as they are placed (as in H.R. 1161) in chapter 71, because all felonies under that chapter of the criminal code are included as wiretapping predicates pursuant to 18 U.S.C. § 2516(1)(i).

We support section 14 of H.R. 1161, which provides that felony sex offenses can be prosecuted without limitation of time. We recommend that the formulation of this proposal in section 202 of H.R. 1104 be used instead, because the H.R. 1104 provision includes additional offenses—specifically, child abduction and sex trafficking—which should be prosecutable without limitation of time.

We support section 15 of H.R. 1161, which would add certain sex offenses against children to the list of crimes which give rise to a rebuttable presumption in favor of pretrial detention. We recommend that the formulation of this proposal in section 221 of H.R. 1104 be used instead, because the H.R. 1104 provision includes additional offenses against children—specifically, child abduction and sex trafficking—for which a presumption in favor of pretrial detention is justified.

Section 16 of H.R. 1161 authorizes up to lifetime post-release supervision for persons convicted of child pornography offenses. It also requires a release condition that such persons, during the period of their supervised release, not possess any form of child pornography (real or virtual). We recommend that the provisions of section 101 of H.R. 1104, which includes additional offenses for which up-to-lifetime supervision should be authorized, and other needed reforms to strengthen post-release supervision of sex offenders, should be included with the provisions of section 16. Specifically, the mandatory release condition amendment in section 16(2) of H.R. 1161 should be combined with the amendments in section 101 of H.R. 1104.

Section 17 of H.R. 1161 would impose a one-time requirement on the Attorney General to prepare and submit a report to Congress detailing the number of times since January 1993 that the Department of Justice has inspected records of producers of materials regulated pursuant to 18 U.S.C. § 2257 and detailing the number of prosecutions under that section. We believe that this provision is unnecessary. We do, however, share the concern that the recordkeeping provisions of § 2257, which were written in the pre-Internet era, may require reviewing and updating in order to ensure their effectiveness. We would be pleased to work with the Subcommittee in addressing this issue.

S. 151 also contains a number of additional provisions not found in the House bill. I would like to call special attention to two of them: a requirement that a defendant provide advance notice of his intention to assert an affirmative defense under the child pornography laws, and civil remedies for victims of child pornography. We strongly support inclusion of these two provisions in the final legislation on this subject.

The Child Abduction Prevention Act

The Department's detailed views on each of the legislative provisions within H.R. 1104 are set forth below. The Department strongly supports the principles underlying these proposals:

- Preventing future crime by extending the length of supervised-release terms for offenders and by establishing a rebuttable presumption in favor of pretrial detention;
- Enhancing law enforcement tools for identifying and apprehending offenders, by including child exploitation offenses as wiretap predicates and by eliminating the statute of limitations for certain offenses;
- Increasing penalties to more accurately reflect the extreme seriousness of these offenses, especially repeat offenses;
- Punishing offenders who travel abroad to prey on children;
- Supporting a coordinated approach to the recovery of abducted children; and
- Providing the States with additional tools and assistance to pursue these common goals.

The Department is eager to work with the Subcommittee to address those issues and to devise a final bill that accomplishes prevention, enforcement, and punishment in the strongest and most effective manner.

Our comments on the specific provisions in the bill are as follows:

TITLE I—SANCTIONS AND OFFENSES

Section 101—Supervised Release Term for Sex Offenders

Section 101 of H.R. 1104 authorizes up to lifetime post-release supervision for persons convicted of child abduction or sex offenses. The Department of Justice supports the enactment of this important reform. Similar provisions have already been passed by the House of Representatives in H.R. 5422 and H.R. 4679 in the 107th Congress.

Under current law, the maximum period of post-release supervision in federal cases is generally five years even for the most serious crimes, and the maximum period for most offenses is three years or less. See 18 U.S.C. § 3583(b). The reform proposed in section 101 of H.R. 1104 is responsive to the long-standing concerns of federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long-term—and in some cases, life-long—monitoring and oversight.

At the state level, a number of jurisdictions have responded to these concerns by authorizing supervision for up to life for broadly defined categories of sex offenders. *See, e.g.,* Ariz. Rev. Stat. § 13–902(E); Colo. Rev. Stat. § 18–1.3–1006(1)(b); D.C. Code § 24–403.01(b)(1)(4). Congress has already addressed the need for authorizing extended supervision for certain types of offenders in other areas. In particular, the USA PATRIOT ACT (Pub. L. 107–56, § 812) enacted 18 U.S.C. § 3583(j), which authorizes up to lifetime supervision for terrorism offenses. Also, provisions of the federal drug laws (in 21 U.S.C. § 841) have been construed by a number of the courts of appeals to mean that there is no upper limit on the potential duration of supervision for persons convicted of drug trafficking offenses. *See, e.g., United States* v.

Garcia, 112 F.3d 395 (9th Cir. 1997); *United States* v. *Williams*, 65 F.3d 301, 309 (2d Cir. 1995); *United States* v. *Orozco-Rodriguez*, 60 F.3d 705, 707–08 (10th Cir. 1995).

As noted above, the House of Representatives has previously responded to the inadequacy of the existing supervision authorizations for sex offenders by passing H.R. 5422 and H.R. 4679. Section 101 of the current bill fully incorporates H.R. 5422 and H.R. 4679's authorization of up to lifetime supervision for the offenses defined in the principal sex offense chapters of the federal criminal code—chapters 109A, 110, and 117 of title 18—and for the sex trafficking offense defined in 18 U.S.C. § 1591.

While most of the covered offenses in H.R. 5422 and H.R. 4679 and in this bill are felonies, the enlarged supervision authorization would extend to a few misdemeanor sex offenses which are encompassed in the cross-referenced provisions (see 18 U.S.C. § 2243(b), 2244(a)(4), (b)). We do not disagree with the House of Representatives' decision to include these misdemeanors, since the actual duration of supervision would remain subject to the court's discretion and would be tailored to the offense and offender in particular cases. *See generally* H.R. Rep. No. 527, 107th Cong., 2d Sess. (2002) (discussion of misdemeanor coverage in committee report for H.R. 4679). In any event, as explained below, we recommend that most of these remaining misdemeanors be increased to felonies.

Following H.R. 5422 § 101 as passed by the House of Representatives in the last Congress, proposed 18 U.S.C. § 3583(k) in section 101 of the current bill includes (non-parental) child abduction cases—*i.e.*, offenses under the kidnapping statute, 18 U.S.C. § 1201, in which the victim is a minor—in the categories for which up to lifetime supervision is authorized. By way of comparison, the federal law standards for state sex offender registration programs, and the provisions of federal law identifying the federal offenders who are subject to special sex offender release notice and registration requirements, cover all non-parental child abductions, whether or not a sexual element can be shown in the offense. See 42 U.S.C. § 14071(a)(3)(A)(i); 18 U.S.C. § 4042(c)(4)(A). Including child abduction among the offenses for which up to lifetime supervision is authorized is equally appropriate, for essentially the same reasons that these offenses are included as "sex offender registration" predicates. As a practical matter, abductions of children by strangers are likely to be for the purpose of sexual abuse, but it may not be possible to establish that fact in a given case. This is particularly true if the victim, or the victim's remains, are never recovered. Moreover, even in a non-sexual case—such as the kidnapping of a child for ransom—the capacity and willingness of the offender to commit such a crime evidences a degree of dangerousness that justifies the availability of longer periods of post-release monitoring and oversight.

Section 101 contains a conforming change in the provisions governing reimprisonment following the revocation of supervised release. Currently, 18 U.S.C. § 3583(e)(3) limits imprisonment following revocation to five years in case of a class A felony, three years in case of a class B felony, two years in case of a class C or D felony, and one year otherwise. Section 101 would amend this provision to make it clear that these are limitations on reimprisonment based on a particular revocation, rather than limits on aggregate reimprisonment for an offender who persistently violates release conditions and is subject to multiple revocations on that basis. We support this change.

Section 101 also makes a complementary change in 18 U.S.C. § 3583(h). Section 3583(h) currently provides that the court may impose an additional term of supervised release to follow reimprisonment based on revocation of release—but not if the maximum reimprisonment term allowed by § 3583(e)(3) was imposed. Thus, if the court wants to preserve the option of providing further supervision for the offender once the term of reimprisonment is over, the court cannot impose the maximum reimprisonment term specified in § 3583(e)—even if the maximum term is fully warranted. Since this limitation works against the effective supervision of released sex offenders and protection of the public, we support section 101's elimination of that limitation.

We also support section 101's requirement that the sentence include a supervised release term of at least five years for the relevant felony offenses. By way of comparison, the provisions of the drug laws relating to post-release supervision mandate that the sentence impose supervision terms of specified lengths for various offenses and offenders. *See* 21 U.S.C. § 841. A corresponding requirement for sex offenders—such as the proposed five year minimum in felony cases—would reflect the judgment that sex offenders generally pose a sufficient public safety concern that they should be subject to observation for a substantial period of time following release. This would not curtail the court's normal authority to revisit the period of supervision imposed in the sentence at any time after one year following release, and to shorten

or terminate supervision if appropriate. *See* 18 U.S.C. § 3583(e)(1). It would, however, reflect a judgment that the period of monitoring and oversight for offenders convicted of serious sex offenses should at least continue for a number of years following release, unless the court affirmatively determines that further supervision is unwarranted.

Section 102—First Degree Murder for Child Abuse and Child Torture Murders

Subsection 102 of the bill amends the federal murder statute, 18 U.S.C. § 1111, to include serious child abuse offenses among the predicate offenses for felony murder, and to classify child murders committed as part of a pattern or practice of assault or torture against children as first-degree murder. The proposed reform in this section was included in former Deputy Attorney General Eric Holder's "children exposed to violence" initiative and in previously introduced legislation. See U.S. Department of Justice, Office of the Deputy Attorney General, *Children Exposed to Violence: Recommendations for State Legislation* 1–2, 12 (May 2000); S. 2783, 106th Cong., 2d Sess. § 4012 (2000). The House of Representatives passed this proposal in H.R. 5422 § 102 last year. We support these changes, which will help to ensure that child abusers who kill their victims receive penalties that reflect the heinousness of their crimes.

1. *Felony murder.* 18 U.S.C. § 1111(a) currently classifies as first-degree murder any murder "committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery." The amendments in section 102 of H.R. 1104 add "child abuse" to this list. Acts of child abuse with lethal consequences are as deserving of such treatment as killings occurring in the course of such offenses as burglary or robbery. A number of States have similarly included child abuse crimes as predicate offenses for felony murder. See Ariz. Rev. Stat. § 13–1105 (first degree murder); D.C. Code § 22–2101 (first degree murder); Fla. Stat. Ann. § 782.04 (first degree murder); Idaho Code § 18–4003 (first degree murder); Kan. Stat. Ann. §§ 21–3401, –3436 (first degree murder); Miss. Code Ann. § 97–3–19 (capital murder); N.D. Cent. Code § 12.1–16–01 (murder); Or. Rev. Stat. § 163.115(1)(b) (murder); Tenn. Code Ann. § 39–13–202 (first degree murder); Utah Code Ann. § 76–5–203 (murder); Wyo. Stat. Ann. § 6–2–101 (first degree murder).

Under H.R. 1104, "child abuse" is defined for felony murder purposes as "intentionally, knowingly, or recklessly causing death or serious bodily injury to a child." As with other felony murder predicates under 18 U.S.C. § 1111, such as robbery or sexual abuse, the commission of child abuse (as defined) together with the resulting death of the victim would suffice to establish liability for first degree murder. *See United States* v. *Thomas*, 34 F.3d 44, 48–49 (2d Cir. 1994).

2. *Pattern of abuse murders.* The section also amends 18 U.S.C. § 1111(a) to classify as first-degree murder any "murder . . . perpetrated as part of a pattern or practice of assault or torture against a child or children." This covers both cases involving a pattern of abuse against the murdered child, and cases involving a pattern of abuse against a number of children.

In this context as well, there is substantial precedent at the state level for similar provisions. A number of states define homicidal offenses which essentially consist of killing a child where the fatal conduct was part of a broader pattern of abuse. *See, e.g.,* Alaska Stat. § 11.41.100 (liability for first-degree murder based in part on infliction of serious physical injury on a child by at least two separate acts, where one of the acts results in the death of the child); Del. Code Ann. title 11, § 633 (defining offense of murder by abuse or neglect in the second degree in part as causing the death of a child where the person "has engaged in a previous pattern of abuse and/or neglect of such child"); Minn. Stat. § 609.185 (liability for first-degree murder based in part on causing "the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon the child"); Or. Rev. Stat. § 163.115(1)(c) (murder by abuse defined in part as causing the death of a child or a dependent person where the offender "has previously engaged in a pattern or practice of assault or torture of the victim or another child . . . or . . . dependent person").

Provisions of this type reflect the fact that fatal child abuse offenses do not take place in a vacuum. The perpetrators of such crimes frequently have histories of abusive conduct committed against the victim of the killing and/or other children. If, for example, an abuser has effectively engaged in the slow killing of a child over time through a continuing course of abuse, the heinousness of his conduct is not less than that of a person who engages in a single homicidal act with premeditation.

The proposed amendments to 18 U.S.C. § 1111 define "pattern or practice of assault or torture" as "assault or torture committed on at least two occasions." Hence, at least one act of assault or torture, in addition to the fatal act, is required. This

is similar to Alaska Stat. § 11.41.100 and Or. Rev. Stat. § 163.115(1)(c), which specify that a total of two acts (including the fatal act) are sufficient to constitute a pattern or practice for purposes of the pattern-of-abuse murder provisions. The effect is to establish liability for first-degree murder whenever the perpetrator's conduct involved: (1) murdering a child through assault or torture, and (2) the commission of assault or torture on at least one other occasion against that child or another child or children. The terms "assault" and "torture" are defined by cross-reference to existing federal law provisions which use these concepts (18 U.S.C. § 113 and § 2340 respectively).

The amendments define "child" for purposes of both the felony murder and the pattern-of-abuse murder provisions as a person below 18 who is under the perpetrator's care or control or who is at least six years younger than the perpetrator. The limitations in the definition reflect the fact that the proposed provisions are focused on the problem of child abuse murders, and are not designed to reach every homicide in which the victim happens to be a juvenile. Some state provisions attempt to draw this line by setting a lower age ceiling than 18 under their child murder provisions. However, children in their mid-teens remain legally and practically under the control of their parents and caretakers, and hence remain particularly vulnerable to abuse—including potentially lethal abuse—by such persons. Rather than excluding such older victims of lethal child abuse, the proposal requires either that the affected child or children be under the perpetrator's care or control, or that there be at least a six-year age difference. As a practical matter, in most fatal child abuse cases, some type of relationship of care or control exists between the perpetrator and the victim or victims, either generally or on the particular occasion(s) when abuse occurs. The alternative ground—which categorically covers cases involving a significant age difference (at least six years)—would moot questions that otherwise could arise about whether a relationship of care or control exists in marginal or ambiguous situations. It also ensures coverage of cases in which there is no relationship of care or control, but which are appropriate in any event for coverage by special child murder provisions, such as a predatory child abuser who fatally attacks a child he does not know or a parent who has lost custody and then kills the child.

Section 103—Sexual Abuse Penalties

Section 103 of the bill includes increased maximum and minimum penalties for sex offenses. We agree that reforms are much-needed in this area, and recommend that the Subcommittee consider the provisions the Department of Justice transmitted to Congress last year in section 104 of the proposed "Child Abduction and Sexual Abuse Prevention Act of 2002." *See* Letter of Assistant Attorney General Daniel J. Bryant to Honorable J. Dennis Hastert (Oct. 4, 2002) (transmitting proposed legislation and analysis statement; explanation of proposed penalty and sentencing reforms for sex offense cases at pp. 12–21 of analysis statement). The proposals in section 104 of our submission overlap with those in H. R. 1104, but include as well a substantial number of additional and alternative reforms which we believe merit the Subcommittee's consideration. Some of these measures are discussed in my statement below.

Subsection (a)

Subsection (a) of section 103 increases the maximum penalties for a number of offenses under the sex offense chapters of the criminal code. We support these penalty increases.

Statutory maximum penalties provide only an upper limit on punishment, and accordingly should be coordinated to the type of penalty which would be appropriate for the most aggravated forms of the offenses in question, as committed by offenders with the most serious criminal histories. Where the statutory maximum penalty is too low, it may be impossible to impose a proportionate penalty in cases involving highly aggravated offense conduct. Likewise, in cases involving incorrigible offenders, low statutory maximum penalties may force the court to impose a sentence that is less than what is warranted in light of the offender's criminal history.

Under current federal law, there are large variations in the maximum penalties authorized for substantively similar sex offenses, depending on the particular basis for the exercise of federal jurisdiction. For example, consider a case that involves a forcible rape or engaging in a sexual act with a victim below the age of 12. If such an offense is committed in the special maritime and territorial jurisdiction of the United States, up to life imprisonment is authorized under 18 U.S.C. § 2241. But if an identical offense is committed by such means as luring the victim through the Internet, or transporting the victim from one state to another, the normal maximum penalty under the sex offense provisions applicable to such crimes (18 U.S.C. § 2422, 2423) is only ten or 15 years.

We accordingly endorse the increases in maximum penalties proposed in section 103(a) of the bill. Paragraph (1) increases the maxima for certain offenses under chapter 110 of the criminal code, which involve the production, distribution, or possession of child pornography. Paragraph (2) increases the maxima for certain offenses under chapter 117, which encompasses offenses involving sexual abuse or commercial sexual exploitation in which federal jurisdiction is premised on interstate elements, such as interstate movement of the victim or the offender, or use of interstate facilities. In cases where the offense involves conduct such as rape or engaging in sexual acts with a young child, these changes will provide maximum penalties closer to those which are currently available for comparable offenses under chapter 109A. Paragraph (3) increases a maximum penalty under the sex trafficking statute, 18 U.S.C. § 1591.

As noted above, we transmitted overlapping penalty reform proposals to Congress last year in section 104 of the proposed "Child Abduction and Sexual Abuse Prevention Act of 2002." Section 104(c) of that proposal included the maximum penalty increases which appear in section 103(a) of H.R. 1104, and some additional provisions which we believe the Subcommittee should incorporate in the current bill. These include penalty increases for certain offenses in the sex offense chapters which are currently graded as misdemeanors. In particular, 18 U.S.C. § 2243(b) and 2244(a)(4) define the offenses of sexual abuse and abusive sexual contact with wards—such as sexual abuse of inmates by a correctional officer, or sexual abuse by a caretaker of a mentally impaired person who is in federal custody. The current misdemeanor gradings of these offenses do not reflect adequately the seriousness of these offenses, the breach of trust they involve, their effects on the victims, or the harm they cause to federal government operations as they relate to the custody and care of offenders and others, and to public confidence in the integrity of such operations. We accordingly recommend that these offenses be subject to more substantial penalties, and specifically that 18 U.S.C. § 2243(b) be made a felony punishable by up to five years of imprisonment, and that 18 U.S.C. § 2244(a)(4) be made a felony punishable by up to two years of imprisonment.

Likewise, we recommend upgrading 18 U.S.C. § 2244(b), which covers engaging in sexual contact with another person without that person's permission in the special maritime and territorial jurisdiction or in a federal prison. The current grading of this offense as a Class B misdemeanor, punishable by up to six months of imprisonment, does not adequately reflect the seriousness of cases it may encompass, such as unwanted sexual contact by inmates as part of sexual aggression against other more vulnerable prisoners. We recommend that this offense be at least upgraded to a Class A misdemeanor, punishable by up to a year of imprisonment, and preferably that it be upgraded to a felony punishable by up to two years of imprisonment.

Subsection (b)

Subsection (b) of section 103 proposes various new or increased mandatory minimum penalties for offenses involving child pornography, and for offenses involving sexual abuse or commercial sexual exploitation in which federal jurisdiction is based on interstate elements. These proposals are responsive to real problems of excessive leniency in sentencing under existing law, which I have described at length above. For example, the offenses under chapter 117 of the criminal code apply in sexual abuse cases involving interstate movement of persons or use of interstate instrumentalities, such as luring of child victims through the Internet. Courts all too frequently impose sentences more lenient than those prescribed by the sentencing guidelines in cases under chapter 117, particularly in situations where an undercover agent rather than a child was the object of the enticement. Yet the offender's conduct in such a case reflects a real attempt to engage in sexual abuse of a child, and the fact that the target of the effort turned out to be an undercover officer has no bearing on the culpability of the offender, or on the danger he presents to children if not adequately restrained and deterred by criminal punishment. Likewise, courts have been disposed to grant downward departures from the guidelines for child pornography possession offenses under chapter 110, based on the misconception that these crimes are not serious.

The Subcommittee may wish to consider, as alternative or supplementary measures to address these problems, provisions appearing in section 104 of the proposed "Child Abduction and Sexual Abuse Prevention Act of 2002." As noted above, we transmitted this proposal to Congress last year. Relevant provisions in that proposal are of two sorts:

First, section 104(d) of that proposal included new and increased mandatory penalties for certain offenses, to ensure that offenders committing similar offenses under different sex offense provisions of the criminal code are subject to similar penalties, and to ensure that the penalties imposed reflect the incrementally more seri-

ous nature of sex offenses when they are committed by recidivists who are not deterred by previous sex offense convictions. We recommend that the Subcommittee adopt these provisions, which are described and explained in the analysis statement accompanying our transmittal of that proposed bill (pp. 18–19).

Second, section 104(b) and (e) of the proposal we transmitted last year included a number of changes in the sentencing guidelines for sex offenses to correct provisions which are inconsistent or excessively lenient. These included in section 104(b) a general prohibition of sentencing below the range specified by the sentencing guidelines in child abduction and sex offense cases, except on grounds of substantial assistance to authorities.[2] In more aggravated cases, this approach would ensure sentences above those required by statutory mandatory minimum provisions alone, because adjustments increasing the offense level and the criminal history category affect the determination of the guidelines range. A reform of this type would help to ensure that the efficacy of the sentencing guidelines system in promoting adequate penalties and protecting the public from child abductors and sexual predators is not undermined in practice.

Section 104—Stronger Penalties Against Kidnapping

Section 104 proposes a number of changes to ensure appropriately severe penalties in kidnapping cases. In this connection, we would recommend the adoption of graduated sentencing guidelines enhancements based on the age of the victim. A provision of this type was included in section 103(a)(2) of the proposed "Child Abduction and Sexual Abuse Prevention Act of 2002," which we transmitted to Congress last year. The proposal included offense level increases of eighteen levels if the abducted person is under age 6 (range of 360 months to life in the lowest criminal history category with no other adjustments); 12 levels if the abducted person is under age 10 (range of 185–235 months in the lowest criminal history category with no other adjustments); and 6 levels if the abducted person is under age 18 (range of 97–121 months in the lowest criminal history category with no other adjustments).

Considering section 104 of H.R. 1104 on its own terms, the House of Representatives passed the same provisions last year in H.R. 5422. We support the proposal in subsection (a)(1) to increase the base level for kidnapping under USSG § 2A4.1(a) from 24 to 32, in the absence of some other appropriate set of enhancements (such as graduated enhancements based on the age of the victim). This would increase the guidelines range, at the lowest criminal history category and without other adjustments, from 51–63 months to 121–151 months.

We support the proposal in subsection (a)(2) to strike USSG § 2A4.1(b)(4)(C), which now reduces the offense level by one if the victim is released before 24 hours have elapsed. The kidnapper is not entitled to a break merely because he let the victim go, e.g., after he was done raping her. Kidnappers should be subject to increased penalties for holding their victims longer—as USSG § 2A4.1(b)(4)(A)–(B) provide—rather than to leniency for not holding them longer.

We also support the proposal in subsection (a)(3) to change the offense-level increase under U.S.S.G. § 2A4.1(b)(5) for cases in which the victim is sexually exploited, from three levels to six levels. (The application notes define sexual exploitation for this purpose to include offenses under 18 U.S.C. §§ 2241–44, 2251, and 2421–23.) The relatively modest three level increase under the current guidelines does not adequately reflect the difference in seriousness between an unaggravated kidnapping and a kidnapping in which, for example, the victim is raped.

Subsection (b) of section 104 proposes a mandatory minimum sentence of 20 years for kidnappings within the scope of 18 U.S.C. § 1201(g), a provision that basically applies to kidnappings of minors by adults who are not near relatives or guardians of the victim. This proposal is responsive to the sentencing system's current failure to accord appropriate weight to the age of the victim in kidnapping cases. This is another area in which the Subcommittee may wish to consider, as an alternative or supplementary measure to address these problems, a general prohibition of sentencing below the range specified by the sentencing guidelines in such kidnapping cases, except on grounds of substantial assistance to authorities.

---

[2] This provision is formulated in our proposal as an amendment to 18 U.S.C. § 3553(b), which would generally preclude going below the guidelines range in sentencing for an offense under 18 U.S.C. § 1201 involving a minor victim, or an offense under chapter 109A, 110, or 117 or section 1591 of title 18. The authority to reduce the sentence on the ground of substantial assistance to the authorities in investigation or prosecution, which is often critical in securing the cooperation of accomplices, would be preserved. Under current law, such substantial assistance is a basis both for sentencing below the guidelines range and sentencing below statutory mandatory minimum penalties. See USSG § 5K1.1; 18 U.S.C. § 3553(e).

Section 105—Penalties Against Sex Tourism

We support the amendments proposed in section 105 of the bill to strengthen the "sex tourism" provisions of federal law. Section 105 amends 18 U.S.C. § 2423 in relation to subsection (b) of that section. Currently, § 2423(b) generally prohibits travel in interstate commerce, and travel by United States persons in foreign commerce, for the purpose of engaging in any sexual act with a person under the age of 18 that would violate the sexual abuse chapter of the criminal code (chapter 109A of title 18) if committed in the special maritime and territorial jurisdiction. In most respects, the proposal in this section is the same as the corresponding provisions in H.R. 5422 as passed by the House of Representatives last year, and in the separate "sex tourism" bill that the House passed earlier in the last Congress. See H.R. 4477, 107th Cong., 2d Sess.; H.R. Rep. No. 525, 107th Cong., 2d Sess (2002).

Section 105 would make a number of important changes:

First, the current formulation of § 2423(b) requires that the Government show that the defendant intended to engage in sexual abuse of a minor at the time he departed from the United States. This is difficult to prove, and irrelevant in any event to the culpability of a United States person who sexually abuses children in a foreign country. Under proposed § 2423(c) in the bill, it is sufficient to show that a United States person traveled abroad and engaged in such conduct, regardless of what his intentions may have been when he left the United States.

Second, § 2423(b) as amended in the bill would clearly cover persons who come into the United States from other countries to engage in sexual abuse or exploitation of children.

Third, the prohibited conduct under the statute is broadened to include all "illicit sexual conduct" as defined in proposed § 2423(f), which includes commercial sex acts (as defined in 18 U.S.C. § 1591(c)(1)) with persons under 18. That encompasses sexual acts with 16 and 17 year old prostitutes which would not otherwise be covered under the chapter 109A offenses that are currently referenced in § 2423(b). (Under the current law, the relevant chapter 109A offense would normally be 18 U.S.C. § 2243(a), which has an age 16 cut-off.)

Fourth, proposed § 2423(d) in the bill directly reaches tour operators who serve "sex tourists" who travel for the purpose of engaging in illicit sexual conduct as defined in proposed § 2423(f).

In cases in which liability depends on engaging in a "commercial sex act" with a person under 18, section 105 makes it an affirmative defense for the defendant to show that he reasonably believed that the person was 18 or older. See proposed § 2423(g) in the bill. This is the same as the version passed by the House in H.R. 5422, but differs from the earlier bill, H.R. 4477, which would have required the Government to prove that the defendant knew or should have known that the other person was below 18. We strongly support the approach of the current bill (H.R. 1104) on this issue.

Placing the burden of proof on the defendant concerning a mistake regarding the victim's age is consistent with the approach of the general federal law provision prohibiting sexual acts with underage persons—18 U.S.C. § 2243(a)—which makes mistake of age an affirmative defense that the defendant must establish by a preponderance of the evidence (see § 2243(c)). Liability for engaging in sexual acts with underage persons under the proposal will generally depend either on engaging in conduct prohibited by 18 U.S.C. § 2243(a) or conduct prohibited as a "commercial sex act." There is no reason for placing the burden on the Government to establish the defendant's knowledge or belief regarding the victim's age in the latter circumstance ("commercial sex act"), when the burden of proof is on the defendant under existing law in the former circumstance (violation of 18 U.S.C. § 2243(a)) and will remain so in that circumstance under the amended statute. Moreover, as a practical matter, requiring the Government to prove beyond a reasonable doubt that the defendant knew or should have known that a child prostitute was under 18 would make prosecution difficult. The direct evidence of the defendant's knowledge or belief on this issue resides in his own mind, and any indirect evidence will likely be based on circumstances and conduct known only to the defendant, occurring in a jurisdiction outside of the United States. Moreover, the defendant would in any event be engaging in sexually exploitative behavior that has no positive social value, and it is not unreasonable to require him to bear the burden of ascertaining that the victim is 18 or older before engaging in a "commercial sex act" with another. A reasonable mistake about age should accordingly be treated as an affirmative defense, as H.R. 1104 proposes.

Section 106—Two Strikes You're Out

Section 106 of the bill proposes a mandatory life imprisonment provision for recidivist child molesters. This proposal was passed by the House of Representatives in

H.R. 5422 and H.R. 2146 in the 107th Congress. We support this proposal in concept, but recommend that its formulation be modified, to ensure that the applicability of the mandatory penalty does not depend on fortuities in the basis for federal jurisdiction over the offense. In particular, we recommend that the Subcommittee consider the "two strikes" provisions in section 104(a) of the proposed "Child Abduction and Sexual Abuse Prevention Act of 2002," which we transmitted to Congress on October 4, 2002.

Currently, subsection (c) of 18 U.S.C. § 2241 generally authorizes imprisonment for any term of years or life for engaging in sexual acts with children below the age of 12, for raping children below the age of 16, or for attempts to commit such offenses. Subsection (c) further provides that a person who commits an offense under that subsection, and has a previous federal or state conviction for such an offense, is to be sentenced to life imprisonment (if not sentenced to death). Thus, a "two strikes" mandatory life imprisonment provision for serious recidivist child molesters already exists under current federal law. The existing provision is inadequate, however, because its applicability depends on jurisdictional predicates which are narrowly defined. For example, § 2241(c) generally applies to an offender who rapes a 12-year-old in the special maritime and territorial jurisdiction—but it does not apply to an offender who transports a 12-year-old in interstate or foreign commerce and rapes her, lures a 12-year-old through the Internet and rapes her, or travels interstate to rape a 12-year-old, though offenses of these types are otherwise subject to federal jurisdiction. *See* 18 U.S.C. § 2422(b), § 2423. Hence, such offenses cannot be prosecuted under 18 U.S.C. § 2241(c), and its mandatory life imprisonment provision is inapplicable to persons federally prosecuted for such offenses who have previous convictions for similar offenses.

The proposal in section 106 of H.R. 1104 attempts to provide a more consistently applicable "two strikes" rule, but significant gaps in coverage would still remain as this proposal is currently formulated. For example, in light of the definition of "Federal sex offense" under the proposal, the predicate offenses would not include raping a child in the production of child pornography in violation of 18 U.S.C. § 2251, or raping a child where the offense is effected through Internet luring of the victim or interstate travel of the offender in violation of 18 U.S.C. § 2422(b) or § 2423(b). As noted above, we included a "two strikes" proposal in section 104(a) of the child protection legislation we transmitted last year, which is designed to ensure more consistently that persons repeatedly convicted of abducting or committing serious sex offenses against children are incarcerated permanently.

Section 107—Attempt Liability for International Parental Kidnapping

Section 107 amends 18 U.S.C. § 1204, which generally prohibits removing a child from the United States or retaining a child outside the United States with intent to obstruct the lawful exercise of parental rights. As amended, the statute would prohibit attempts to commit this offense, as well as completed offenses.

This change is needed to facilitate effective intervention and prevention of parental kidnappings of children before they are removed from the United States. The current absence of attempt liability has created difficulties in cases in progress where the abducting parent is on the way out of the country, but is still transiting in the United States. In those cases, the FBI now has very limited ability to become involved and prevent the abduction from becoming an international occurrence. Local and state law enforcement must be looked to to prevent the removal of the child from the country in such cases, but state and local authorities have been very reluctant to become involved. The proposed addition of attempt liability will resolve these problems by enabling the FBI to deal with these cases directly. In addition, it will make penalties and means of restraint available through criminal prosecution and conviction in cases where persons attempt international child abductions in violation of 18 U.S.C. § 1204, but are apprehended before they succeed in getting the child out of the country.

In addition to adding attempt liability, section 107 of the bill updates the statute by including a reference to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in subsection (c)(1) of § 1204, in addition to the current reference to the Uniform Child Custody Jurisdiction Act (UCCJA). Both acts were prepared by the National Conference of Commissioners on Uniform State Laws. The UCCJEA was finalized in 1997 to update interstate custody law to include international and domestic violence issues, and has been widely adopted by the states to replace the UCCJA in state codes.

Section 201—Law Enforcement Tools to Protect Children

Section 201 of the bill would facilitate the effective investigation of sex offenses through court-ordered wiretapping, by incorporating additional sex offenses as wiretapping predicates. Proposals to expand sex offense wiretap predicates were previously passed by the House of Representatives in H.R. 5422 and H.R. 1877 in the 107th Congress. We support the expansion of predicate offenses proposed in this section.

Current federal law allows the interception of oral and electronic communications ("wiretapping") if authorized by a court order. A number of requirements must be satisfied to issue such an order, including probable cause to believe that an offense specifically enumerated in 18 U.S.C. § 2516 has been or will be committed and that particular communications concerning the offense will be obtained through the proposed interception. The current enumeration in 18 U.S.C. § 2516 is inadequate in relation to such offenses as child sexual exploitation, Internet luring of children for purposes of sexual abuse, and sex trafficking. For example, while the list of wiretap predicates now includes a variety of offenses involving, for example, theft, fraud, and trafficking in stolen property, it does not include the crime under 18 U.S.C. § 2251A of buying or selling a child to be used in the production of child pornography, any of the crimes under chapter 117 of the criminal code relating to interstate transportation or travel or use of interstate instrumentalities to promote prostitution or other sexual offenses, or the offense of sex trafficking in persons under 18 U.S.C. § 1591. The proposal in section 201(a) of this bill improves investigative authority in relation to sex offenses by adding as wiretap predicates several offenses under the sex offense chapters of the criminal code which are not currently covered—specifically, 18 U.S.C. §§ 2251A, 2252A, 2260, 2421, 2422, 2423, and 2425, as well as the sex trafficking statute, 18 U.S.C. § 1591.

The important objectives of this reform were aptly described in the House Judiciary Committee's deliberations concerning H.R. 1877:

> Because of advances in computer technology, as well as 24 million children who regularly use the Internet, child molesters have easy access to potential victims and new opportunities to ply their trade.
>
> The FBI has testified that computer technology is becoming the technique of choice and that those types of crimes are increasing. . . . The American Medical Association released a study last summer on children who regularly use the Internet. The study found that nearly 1 in 5 children surveyed received an unwanted sexual solicitation online in the last year, yet few reported the action to police. We cannot ignore this growing problem.
>
> Law enforcement officials must have the tools necessary to deal with these crimes. Often, child molesters used the Internet to make initial contact with the child. They then convince the child to go off-line and use a telephone to set up meetings with the children.
>
> Current Federal criminal law authorizes law enforcement officials to wiretap [in investigating] some child sexual exploitation crimes but not others. The interception of oral communications through wiretaps significantly enhances investigations. . . .
>
> According to a March 2002 Congressional Research Service report, "The trafficking in people for prostitution and forced labor is one the fastest growing areas of international criminal activity and one that is of increasing concern to the U. S. and the international community. The overwhelming majority of those traffick[ed] are women and children. More than 700,000 people are believed to be trafficked each year worldwide, some 50,000 to the United States. Trafficking is now considered the third largest source of profits for organized crime behind only drugs and weapons, generating billions of dollars annually. . . .
>
> [T]rafficking victims are raped, starved, forced into drug use, and denied medical care. Law enforcement officials must be given every tool available, including wiretapping, to investigate and stop this trafficking.

H.R. Rep. No. 468, 107th Cong., 2d Sess. 20, 23 (remarks of Rep. Smith).

In light of the coverage of §§ 2422 and 2423 in section 201(a) of the bill, the more restrictive coverage of these offenses in section 202(b) is redundant and should be deleted.

Section 202—No Statute of Limitations for Child Abduction and Sex Crimes

We support section 202 of the bill, which provides that child abductions and felony sex offenses can be prosecuted without limitation of time. The House of Representatives passed the same provisions last year in H.R. 5422.

In most contexts, the perpetrator of a federal crime who manages to avoid identification for five years has probably avoided prosecution forever, because the limitation period applicable to most federal crimes is five years. *See* 18 U.S.C. § 3282. There are some exceptions to this limitation—*see, e.g.*, 18 U.S.C. § 3281 (no limitation period for capital crimes); 18 U.S.C. § 3293 (ten-year limitation period for certain financial institution offenses); 18 U.S.C. § 3294 (twenty-year limitation period for certain thefts of artwork). Existing law also modifies the current limitation rules for certain cases involving child victims by providing that the limitation period does not bar prosecution "for an offense involving the sexual or physical abuse of a child under the age of eighteen years . . . before the child reaches the age of 25 years." 18 U.S.C. § 3283. While this is better than a flat five-year rule, it remains inadequate in many cases. For example, a person who abducted and raped a child could not be prosecuted beyond this extended limit—even if DNA matching conclusively identified him as the perpetrator one day after the victim turned 25. Nor is this provision applicable in any case that does not involve child victims, such as that of a serial rapist of adult victims who is identified a number of years after the commission of the crimes through DNA matching.

There is recent precedent for congressional action on this issue. Specifically, § 809 of the USA PATRIOT ACT (P.L. 107–56) enacted 18 U.S.C. § 3286(b), which eliminated the limitation period for prosecution of many terrorism offenses. We have noted in previous congressional testimony the need to adopt similar reforms to extend or eliminate the limitation period for prosecution in cases involving sexually assaultive crimes or potential DNA identification. *See* Statement of Sarah V. Hart, Director, National Institute of Justice, before the Senate Judiciary Subcommittee on Crime and Drugs Regarding DNA Initiatives, at 7–8 (May 14, 2002).

At the state level, the rules governing the initiation of criminal prosecutions are often more permissive than those currently applicable in federal cases. A number of states have *no* limitation period for the prosecution of felonies generally, or for other broadly defined classes of serious crimes. *See, e.g.,* Ala. Code § 15–3–5 (no limitation period for prosecution of felonies involving violence, drug trafficking, or other specified conduct); Ky. Rev. Stat. § 500.050 (generally no limitation period for prosecution of felonies); Md. Cts. & Jud. Proc. Code § 5–106 (same); N.C. Gen. Stat. § 15–1 (same); Va. Code § 19.2–8 (same); *see also* Ariz. Rev. Stat. § 13–107(E) (limitation period for prosecution of serious offenses tolled during any time when identity of perpetrator is unknown). Other states have amended their statutes of limitations in light of the development of DNA technology and its ability to make conclusive identifications of offenders even after long lapses of time. Common reforms include extending or eliminating the limitation period for prosecution in sexual assault cases or cases that may be solvable through DNA testing. *See, e.g.,* Ark. Code § 5–1–109(b)(1); Del. Code tit. 11 § 205(i); Ga. Code § 17–3–1(b), (c.1); Idaho Code § 19–401; Ind. Code § 35–41–4–2(b); Kan. Stat. § 21–3106(7); La. Crim. Proc. Code art. 571; Mich. Comp. Laws § 767.24(2)(b); Minn. Stat. § 628.26(m); Or. Rev. Stat. § 131.125(8); Tex. Crim. Proc. Code art. 12.01(1)(B).

Section 202 of H.R. 1104 would enact a new section 3296 in title 18, providing that federal child abduction and felony sex offenses can be prosecuted without limitation of time. The covered felonies would be the same as those for which up to lifetime supervision is authorized by section 101 of H.R. 1104. This is parallel to the USA PATRIOT ACT reforms, which eliminated the upper limit on the duration of supervision and the limitation period for the commencement of prosecution for identically defined classes of terrorism offenses. *See* P.L. 107–56 §§ 809, 812.

The proposal in section 202 also parallels the USA PATRIOT ACT in providing that its statute of limitations reform will apply retroactively to offenses committed before its enactment. *See* P.L. 107–56 § 809(b) (providing in identical language that statute of limitations reform "shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section.") This is an important provision which ensures that, for example, there will be no time bar to the prosecution of rape cases which were unsolvable at the time of their commission, but which may now be solvable through the use of the DNA matching technology and databases.

The retroactive application of this type of reform is constitutional because the Constitution's prohibition of ex post facto laws only bars (1) criminalizing conduct that was non-criminal when it occurred; (2) aggravating the seriousness of a crime; (3) increasing the penalty for a crime after its commission; or (4) retroactively reducing the nature or quantum of evidence sufficient for conviction of a crime. *See*

Carmell v. *Texas,* 529 U.S. 513 (2000); *Collins* v. *Youngblood*, 497 U.S. 37 (1990). Since legislative changes that affect the limitation period for prosecution do none of these things, they are not constitutionally proscribed ex post facto measures. *See Carmell,* 529 U.S. at 539 ("mistake to stray beyond" these four identified historic categories of types of impermissible ex post facto laws); *United States* v. *Grimes*, 142 F.3d 1342, 1350–51 (11th Cir. 1998) (noting uniform holdings of the federal courts of appeals that retroactive legislative changes of limitation periods are constitutional as applied to prosecutions in cases where the previous limitation period had not yet expired), *cert. denied*, 525 U.S. 1088 (1999); *People* v. *Frazer*, 982 P.2d 180, 190–98 (Cal. 1999) (holding that retroactive legislative extension of limitation period is not an impermissible ex post facto law even as applied to a case in which the previous limitation period already had expired), *cert. denied*, 529 U.S. 1108 (2000). Moreover, the Due Process Clause does not incorporate any principle of justice or repose that generally entitles the perpetrator of, for example, a child abduction or rape to permanent immunity from prosecution merely because he has succeeded in avoiding identification and apprehension for some period of time, or because of a procedural rule limiting the time to commence prosecution which has been superseded by later legislation. *See, e.g., Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314–16 (1945) (due process does not forbid legislative changes in statutes of limitations that revive time-barred actions); *Frazer*, 982 P.2d at 198–205 (extending the same due process analysis to criminal statutes of limitations).

Section 221—No Pretrial Release for Those Who Rape or Kidnap Children

We support section 221 of H. R. 1104, which would add child abduction and certain sex offenses against children to the list of crimes which give rise to a rebuttable presumption in favor of pretrial detention.

Under current law, a defendant may be detained before trial if the Government establishes by clear and convincing evidence that no release conditions will reasonably assure the appearance of the person and the safety of others. Current law also provides rebuttable presumptions that the standard for pretrial detention is satisfied in certain circumstances. For example, such a presumption exists if the court finds probable cause to believe that the defendant committed a drug offense punishable by imprisonment for 10 years or more, or that the person committed a crime of violence or drug trafficking crime while armed with a firearm, in violation of 18 U.S.C. § 924(c). *See* 18 U.S.C. § 3142(e).

Thus, existing law creates a presumption that, for example, an armed robber charged under 18 U.S.C. § 924(c) cannot safely be released before trial. A presumption of this type is at least equally warranted in relation to such crimes as child abduction and child rape. Indeed, believing otherwise would require closing one's eyes to reality.

Section 241—Amendment

This provision would require federal, state, and local law enforcement agencies to report each case of a missing child under the age of 21 (rather than the current age 18) to the National Crime Information Center (NCIC). We note that the NCIC already allows for missing persons of any age to be entered into the NCIC, based on certain criteria. We would be pleased to work with the Subcommittee in examining how the existing reporting arrangements might be improved.

TITLE III—PUBLIC OUTREACH

Section 301—National Coordination of AMBER Alert Communications Network

AMBER is an acronym for America's Missing: Broadcast Emergency Response. The AMBER Program was created in 1996 as a legacy to 9-year-old Amber Hagerman, who was kidnapped and murdered in Arlington, Texas. Following her murder, concerned individuals contacted local radio stations in the Dallas area and suggested that the station broadcast special "alerts" over the airways to help find abducted children. The Dallas/Fort Worth Association of Radio Managers, with the assistance of law enforcement agencies in northern Texas, established the first AMBER Plan.

The purpose of the AMBER Plan is to provide a rapid response to the most serious child abduction cases. Rapid response is critical when a child is abducted, because data show that 74% of children who are killed during an abduction are killed within the first 3 hours. When an AMBER alert is activated, in addition to the tremendous resources of law enforcement agencies, thousands of radio listeners and television viewers are added to the team of people engaged in the recovery of the abducted child. The combined efforts of the police and the public, through the use of the AMBER Alert system, have already helped to reunite 47 abducted children with their families.

There are currently 87 AMBER Plans across the country; 38 of those plans are statewide. AMBER Plans are voluntary, cooperative agreements between law enforcement agencies and local broadcasters to send an emergency alert to the public when a child has been abducted, it is believed that the child's life is in grave danger, and there is enough descriptive information about the child, abductor and the suspect's vehicle to believe an immediate broadcast alert would help. Under the AMBER Plan, radio and television stations interrupt programming to broadcast information about the missing child using the Emergency Alert System (EAS), formerly known as the Emergency Broadcast System. As I indicated, with only partial implementation across the country, 47 children have been recovered as a direct result of AMBER plan implementation.

H.R. 1104 promotes national coordination, assistance and grant funding for AMBER Plans across the country. The Department of Justice supports the concepts embodied in this legislation because AMBER alerts are a powerful law enforcement tool in the recovery of abducted children. AMBER Plans send a strong message that law enforcement and broadcasters are actively involved in the protection of our Nation's children, and can mobilize thousands of citizens instantaneously in those critical hours immediately following an abduction.

Given the ease of interstate travel, creating a seamless network of AMBER plans across the country is an essential next step in the success of the AMBER program. A nationwide AMBER network will ensure that law enforcement can activate an alert and engage communities in the search for an abducted child across state lines, across a region, within a defined region or, if necessary, nationwide.

Under H.R. 1104, the Department of Justice would designate one of our officials as a nationwide point of contact for the development of the national network. H.R. 1104 tasks the National AMBER Alert Coordinator with eliminating gaps in the network, including gaps in interstate travel, working with States to encourage development of additional AMBER plans, working with States to ensure regional coordination among plans, and serving as a nationwide point of contact. The Department of Justice is uniquely situated to perform these duties and we would be pleased to do so.

In fact, approximately one year ago, the Department, in cooperation with the National Center for Missing and Exploited Children (NCMEC), developed an information packet for distribution to any state or locality interested in establishing an AMBER plan. Many of the programs in existence today were established with the help of NCMEC and the Department of Justice.

In addition to providing aid in the establishment of AMBER programs, H.R. 1104 requires that the AMBER Alert Coordinator cooperate with the Federal Bureau of Investigation in carrying out his or her duties. As the FBI is a component of the Department of Justice, such coordination will be straightforward. Also, the FBI's Crimes Against Children Program is a specialized unit within the FBI with substantial expertise in combating all types of crimes against children, especially abductions and kidnaping. This CAC program stands ready to respond any time there is an abduction where the perpetrator crosses state lines or a state or local law enforcement agency requests their assistance.

Section 302—Minimum Standards for Issuance and Dissemination of Alerts through AMBER Alert Communications Network

H.R. 1104 also tasks the Department of Justice Coordinator with establishing nationwide minimum standards for the issuance of an AMBER alert and the extent of dissemination of the alert. The legislation allows for voluntary adoption of these standards. The Department supports the establishment of minimum standards because such standards will help to limit the use of the system to those rare instances of serious child abductions when the child's life is likely to be endangered. Limiting the frequency of AMBER Alerts is critical to the long-term success of the program. Overuse or misuse of AMBER Alerts could lead to public fatigue or numbness to the alerts.

NCMEC currently recommends that an AMBER Alert be issued only when law enforcement confirms that the child has been abducted and is in serious danger of bodily harm and where there is enough descriptive information about the child or the suspect to believe that an immediate broadcast will help. These recommendations provide a framework in which to establish appropriate minimum standards for the issuance of an alert.

This section requires the Coordinator to consult with state and local law enforcement agencies to establish standards for limiting the alerts to appropriate geographic areas. The Department supports this concept for the same reasons that we believe establishing standards for the issuance of alerts is a good idea—ensuring that AMBER alerts are not overused is critical to the long term success of the pro-

gram. Limiting alerts to a geographic region where they can be most useful is the best approach to successfully using AMBER alerts as a tool to bring abducted children home safely.

Consultation with state and local law enforcement will be beneficial in the effort to establish minimum standards, because these are the individuals who have already begun using the AMBER program and they will continue to be the primary users of the program in the future. One strength of H.R. 1104 is that the control over the AMBER programs remains with States and localities while giving those entities the benefit of national coordination.

The Coordinator is also required to cooperate with local broadcasters, the Secretary of Transportation, and the Federal Communications Commission in establishing standards. All of these people and agencies can provide valuable input to the development of standards that will be useful to law enforcement and broadcasters, and beneficial to the community.

Section 303—Grant Program for Notification and Communications Systems Along Highways for Recovery of Abducted Children

This section authorizes $20,000,000 for fiscal year 2003 for the Secretary of Transportation to make grants to States for the development or enhancement of notification or communications systems along highways for alerts and other information for the recovery of abducted children.

The Department of Transportation has recognized the value of the AMBER Alert Program and supports state and local governments' choice to implement the program. The DOT believes that public agencies should develop a formal policy and have a sound set of procedures for calling an AMBER alert. A key to the success of such programs is seamless coordination between law enforcement agencies and those responsible for public outreach, including the transportation community.

To assist in this effort, the DOT recently issued a policy that supports the use of changeable message signs along highways for AMBER alerts. These child abduction alerts may be communicated through various means, including radio and television stations, highway advisory radio, changeable message signs, and other media.

The Department of Transportation will continue to work closely with state and local governments, as well as with the Department of Justice, on this important issue. DOT looks forward to working with Congress on funding to support this critical initiative.

Section 304—Grant Program for Support of AMBER Alert Communications Plans

This section of H.R. 1104 directs the Attorney General to administer a grant program for "the development and enhancement of programs and activities for the support of AMBER Alert communication plans." The Department of Justice supports the concepts addressed in this portion of the legislation. The Department believes that developing and distributing educational and training programs, and providing funds for other needs such as equipment upgrades relating to AMBER programs, is an important service to our Nation. We look forward to working with Congress on funding to support this important initiative, and working with Congress, communities and states to determine the most effective use of the funds to achieve the goals of AMBER Alert.

Section 305—Increased Support

Section 305 amends 42 U.S.C. § 5773(b)(2) to increase the authorized NCMEC funding level to $20,000,000 in 2003 and 2004. The Administration strongly supports the programs and mission of NCMEC, as demonstrated in the generous funding we have requested of Congress on behalf of this worthy organization for several years. We are gratified that the FY 2003 Omnibus Spending bill includes over $15 million in line funding for NCMEC. We look forward to working with Congress on continuing to provide appropriate funding for this critical program.

Section 306—Sex Offender Apprehension Program

Section 306 of H.R. 1104 amends 42 U.S.C. § 3796dd(d) by adding, to the list of authorized objectives for COPS grant funding, assistance to states in enforcing their sex offender registration requirements. The Office of Community Oriented Policing Services (COPS), within the Department of Justice, is responsible for making grants to state and local law enforcement agencies to help them fight crime and advance community policing. COPS grants are currently used to hire community policing officers, hire school resource officers, purchase time-saving technology, combat methamphetamine production and use, assist tribal law enforcement, and advance community policing strategies through training and technical assistance. The Administration has no objection to adding this new objective, provided that use of COPS

grant funding for this purpose is at the discretion of local law enforcement, not mandated by the federal Government.

I would be pleased to answer any questions the Committee might have on these matters.

Mr. COBLE. Thank you, Mr. Collins, and you beat the 5-minute—well, I think you tied the 5-minute limit.

Now, Mr. Sullivan, I believe you are addressing the abduction—the Child Abduction Prevention Act.

STATEMENT OF RONALD S. SULLIVAN, JR., DIRECTOR, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

Mr. SULLIVAN. Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to speak to you today regarding the Child Abduction Prevention Act. I am pleased to testify today on behalf of the American Council of Chief Defenders, a leadership section of the National Legal Aid and Defender Association. The ACCD is made up of chief executive officers of public defense agencies ranging in size from more than 1,000 employees to rural offices with less than 10.

The ACCD is meeting, as you probably know, in Washington, D.C., this week to commemorate the 40th anniversary of *Gideon* v. *Wainwright*.

First and foremost, the ACCD understands and shares in this Nation's concern for the safety of its children. The proposed AMBER Alert system is a promising step toward ensuring a more efficient and effective law enforcement response to the problem of missing and exploited children in the United States.

Notwithstanding the laudable intent behind the CAPA legislation, many of its provisions dealing with sexual offenses in the Federal criminal code give cause for serious concern. The legislation, in our view, is flawed in three principal respects:

First, the bill proposes increases in sentences and supervised release periods for sex offenses that are often grossly disproportionate to the crimes involved and that treat sex offenders—whatever their crime—more harshly than other, more violent offenders.

Second, the bill's criminalization of sex acts committed by U.S. citizens and resident aliens in a foreign jurisdiction, with no requirement that the offender form the requisite criminal intent in or while traveling from the United States, does violence to accepted notions of Federal jurisdiction and likely is constitutionally infirm.

Finally, the bill's proposed changes to mandatory minimum sentences and pretrial detention laws unnecessarily takes needed discretion away from judges.

With this backdrop, I will provide a more specific critique of a few illustrative, but not all, provisions under consideration today. In light of the strictly enforced 5-minute time constraint, my written testimony will provide a more fulsome analysis of the several provisions of the bill.

Section 101 of the bill, which suggests—which subjects people to—people convicted of Federal sex offenses to a lifetime of supervised release, is a grossly disproportionate means of attempting to decrease recidivism among sex offenders. Virtually no other Federal offense carries such a potentially lengthy term of supervised

release. The vast majority of Federal crimes carry a supervised release of 5 years.

In addition, the reach of this section extends to conduct that likely is not contemplated by the drafters of this legislation. For example, the non-consensual touching of a person's inner thigh through clothing may subject the defendant to a lifetime of supervised release, while the most brutal non-sexual assaults, drug-related offenses, and killings are subject to a maximum of 5 years of supervised release. This seems out of proportion.

Section 102 of the bill adds "child abuse" and a "pattern of assault against a child" to the list of predicate crimes in the Federal first-degree murder statute. It's found at 11 U.S.C., section 1111. This proposal is unprecedented in that it could allow a jury to impose a sentence of death for reckless conduct that results in death. Every single crime currently listed as a predicate crime in section 1111—arson, rape, kidnapping, for example—requires at least the knowing commission of a felony. In contrast, child abuse, as defined in the Federal code, includes any reckless act that "causes serious bodily injury to a child." And the bill's definition of a "pattern of assault or torture" would include a person who commits two misdemeanor-level assaults on a child. While such conduct is reprehensible, it is not comparable to the current list of predicate crimes that is currently found in the Federal murder statute which require intentional or knowing states of mind in order for a mandatory death or life imprisonment sentence to attach.

Section 105 of the bill, which prohibits the United States—which prohibits United States citizens and permanent resident aliens from committing various sex acts while in a foreign jurisdiction, turns the notion of Federal jurisdiction on its head by removing the requirement that the offender at least form a criminal intent to commit the crime while in, or traveling from, the United States.

Section 202, which removes the statute of limitations for all felony sex offenses, is equally well-intended but misguided. Removing the statute of limitations from sex offenses would be a serious violation of an accused person's due process rights. Decades or even years after an offense, witnesses become hard to find, memories fuzzier. Innocent defendants will likely find it difficult, if not impossible, to defend against sex abuse charges.

In conclusion, I would just state because of this that the law would actually create, or could actually create, the perverse incentive for false accusers to wait several years before making an allegation of sexual abuse.

I'll be happy to answer any questions. Thank you.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF RONALD S. SULLIVAN, JR.

Thank you for the opportunity to speak to the Subcommittee on Crime, Terrorism, and Homeland Security regarding the Child Abduction Prevention Act (CAPA). I am pleased to testify today on behalf of the American Council of Chief Defenders (ACCD), a leadership section of the National Legal Aid and Defender Association. The ACCD is made up of the chief executives of public defense agencies ranging in size from more than 1000 employees to rural offices with less than ten. These agency heads administer billions of dollars of public budgets and deliver services to millions of indigent clients every year, helping them navigate through a complex criminal justice system, and obtain needed services like mental health or drug treatment.

The ACCD is meeting in Washington, D.C. this week to commemorate the 40th anniversary of the Supreme Court ruling that buttresses one of the cornerstones of our democracy: the right to counsel. On March 18, 1963, the Supreme Court ruled in *Gideon* v. *Wainwright*, that people who cannot afford to hire a lawyer have a federal constitutional right to legal representation in state courts.[1]

First and foremost, the ACCD understands and shares in the nation's concern for the safety of its children. The proposed AMBER alert system is a promising step toward ensuring a more efficient and effective law enforcement response to the problem of missing and exploited children in the United States.

Notwithstanding the laudable intent behind CAPA, many of its provisions dealing with sexual offenses in the federal criminal code give cause for serious concern. The legislation is seriously flawed in three principal respects. First, the bill proposes increases in sentences and supervised release periods for sex offenses that are often grossly disproportionate to the crimes involved and that irrationally treat sex offenders—whatever their crime—more harshly than other, more violent offenders. Second, the bill's criminalization of sex acts committed by U.S. citizens and resident aliens in a foreign jurisdiction, with no requirement that the offender form the requisite criminal intent while in or traveling from the United States, turns the notion of federal jurisdiction on its head. Finally, the bill's proposed changes to mandatory minimum sentences and pretrial detention laws take needed discretion away from judges unnecessarily, because the carefully designed laws as currently written already strike an appropriate balance between protecting the rights of the accused and ensuring the safety of the community.

Specifically, we believe that Section 101 of the Bill, which subjects people convicted of federal sex offenses to a *lifetime* of supervised release, is a grossly disproportionate means of attempting to decrease recidivism among sex offenders. No other federal offense carries such a potentially lengthy term of supervised release, with the exception statutory provisions in the recently enacted U.S.A. Patriot Act. Even for the most of the serious federal offenses punishable by either life imprisonment or death, the current maximum period of supervised release is only five years.[2] Moreover, many of the sex offenses covered under this proposal are consensual acts with underage victims,[3] nonconsensual touching of a person's breast or thigh or buttocks through clothing,[4] or are "travel with intent" crimes that do not require proof of an attempted or completed sexual act at all.[5] Under the proposed Bill, those who commit the most brutal non-sexual assaults, drug-related offenses, and killings are subject to a maximum of five years of supervised release while someone convicted of touching an adult's buttocks, breast or inner thigh without permission is potentially subject to a *lifetime* of government monitoring. The proposal's harsh treatment of sex offenders, irrespective of whether their offenses were violent or nonviolent, compared to its more balanced treatment of other offenders, makes little sense.

Moreover, the oft-repeated claim that sex offenders are at a higher risk of recidivating is dubious at best and is not a justification for a *lifetime* of supervised release. A Department of Justice study indicates that sex offenders do not recidivate

---

[1] One message that the ACCD hopes to convey to the Congress and the nation during this visit is that *Gideon*'s promise is far from fulfilled in jurisdictions—large and small—in every state. "Despite the progress in many jurisdictions," declared a U.S. Department of Justice report issued in 2000, "indigent defense in the United States today is in a chronic state of crisis. Standards are frequently not implemented, contracts are often awarded to the lowest bidder without regard to the scope or quality of services, organizational structures are weak, workloads are high, and funding has not kept pace with other components of the criminal justice system. The effects can be severe, including legal representation of such low quality to amount to no representation at all, delay, overturned convictions, and convictions of the innocent." Ultimately, the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole."

[2] *See* 18 U.S.C. § 3559(a) (offenses carrying a maximum penalty of life imprisonment or death are "Class A" felonies); 18 U.S.C. § 3583(b) (authorizing "not more than five years" of supervised release for Class A felonies).

[3] *See* 18 U.S.C. § 2243(a) (imposing strict criminal liability for sexual acts with a person between ages 12 and 15 when victim is at least four years younger than offender).

[4] *See* 18 U.S.C. § 2244(b) (criminalizing sexual contact with another person without that person's permission); 18 U.S.C. § 2246(3) (definition sexual contact to include "the sexual touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, harass, degrade, or arouse or gratify the sexual desire of any person").

[5] 18 U.S.C. § 2423(b), with the amendments proposed under the Bill, criminalizes interstate or foreign travel with the intent to engage in illicit sexual conduct; § 2423(b) prosecutions do not require proof of an attempted or completed sex act. *See, e.g., United States* v. *Brockdorff*, 992 F. Supp. 22, 24 (D.D.C. 1997).

at a high rate, and several studies have shown sex offenders to have a lower recidivism rate than other types of offenders.[6]

In any event, an increase in sex offenders' supervised release periods is not necessary to ensure the safety of the community. Every state of the union has a sex offender registration program, most of which require ten years or lifetime registration and monitoring for those convicted of *federal* sex offenses. Those federal sex offenders who are not otherwise covered by a state program must register with the FBI pursuant to the Jacob Wetterling Act.[7] Thus, legislation is already in place to ensure that the community has considerable information on sex offenders, often including their home and work addresses and photograph, and can protect themselves accordingly.

Section 102 adds "child abuse" and a "pattern of assault against a child" to the list of predicate crimes in the federal first-degree murder statute, 18 U.S.C. § 1111. This proposal is unprecedented in that it allows a jury to impose a sentence of death for a second-degree murder, inappropriately elevating mere reckless or misdemeanor-level conduct. Every single crime currently listed as a "predicate crime" in § 1111 such as arson, escape, kidnapping, and the like, requires the *knowing* commission of a felony. In contrast, "child abuse," as defined in the Bill, includes any "reckless" act that causes "serious bodily injury to a child." And the Bill's definition of a "pattern of assault or torture" would include a person who commits two misdemeanor-level assaults on a child.[8] While such conduct is reprehensible, it is not comparable to the current list of predicate crimes in the federal murder statute and it alone should not turn what would otherwise be a second-degree murder with *no* minimum jail sentence into a first-degree murder with a mandatory punishment of death or life in prison.[9]

The increase in mandatory minimum sentences in Section 103 of the Bill will leave even less discretion in the hands of federal judges to fashion sentences that serve all goals of punishment, including rehabilitation. Placing a parent in jail for a minimum of 15 years for allowing her son or daughter to assist in the production of pornography, while perhaps justified in a given case, should not be mandatory. Judges should have the ability to consider the equities of a situation and impose sentence accordingly.

Section 105 of the Bill, which prohibits United States citizens and permanent resident aliens from committing various sex acts while in a foreign jurisdiction, turns the notion of federal jurisdiction on its head by removing the requirement that the offender at least form a criminal intent to commit the crime while in, or traveling from, the United States. Unlike "travel with intent" laws, which criminalize the use of channels of commerce for criminal purposes, Section 105 actually asserts federal jurisdiction over the prosecution of sex acts committed in a foreign jurisdiction without discernable connection to the United States. Thus, if a person decided to travel to Spain for an innocuous purpose such as business or touring, and thereafter chose to commit a sex act while in Spain, the act would suddenly be a federal crime under Section 105.

Because this law would reach merely the commission of a criminal *act* in another jurisdiction without requiring the use of channels of commerce for criminal purposes, it is of questionable constitutionality. While Congress may regulate the use of channels of commerce under the Commerce Clause, the Constitution prohibits the federal government from passing general criminal laws that should instead be the sole province of another jurisdiction. Three years ago, for example, the Supreme Court in the *Morrison* case struck down a federal law providing civil remedies to victims of gender-motivated violence, deciding that such violent crimes were reprehensible but were not closely enough linked to interstate commerce to justify the federal government's meddling.[10] In the same respect, acts of "illicit sexual conduct"

---

[6] *See* Brief of Amicus Curiae Public Defender for the State of New Jersey, *Godfrey* v. *Doe*, No. 01–729, 2002 WL 1798881, at *22–23 (July 31, 2002) (citing studies and quoting U.S. Dep't of Justice, Center for Sex Offender Management, Myths and Facts About Sex Offenders (August 2000) (listing as a "myth" statement that "[m]ost sex offenders reoffend")).

[7] *See* 42 U.S.C. § 14072.

[8] The word "assault" in the Bill "has the same meaning as given that term in section 113." § 102(c). In turn, 18 U.S.C. § 113(a)(5) criminalizes all levels of "assault," including "simple assault," punishable by six months if the victim is 16 or older.

[9] *See* 18 U.S.C. § 1111 (first-degree murder punishable by either life imprisonment or death; second-degree murder punishable by "any term of years or for life").

[10] *See United States* v. *Morrison,* 529 U.S. 598, 613 & n.5 (2000) (striking down civil remedy portion of Violence Against Women Act as exceeding Congressional power under the Commerce Clause, noting that "gender-motivated crimes of violence" and other crimes are not intrastate activities substantially affecting interstate commerce).

committed in a foreign jurisdiction, with no requirement that the offender have the intent to commit such acts while traveling to the foreign jurisdiction, are exactly the type of general offenses that Congress must leave to local and foreign jurisdictions to prosecute.

Section 106, the "two strikes you're out" provision, is both grossly disproportionate to the crimes it covers and is unnecessary to effective law enforcement. For example, this provision would impose a *mandatory life sentence* for just two convictions of touching a 16-year-old's breast, inner thigh, or buttocks through his or her clothing.[11] Likewise, it would cover two convictions for consensual sexual intercourse between a 19-year-old and a 15-year-old.[12] In fact, under the law as proposed, a person could spend his life in prison for two convictions of travel with intent to engage in a sex act with a minor *without ever having committed a criminal act*. The "two strikes" law is also not necessary for effective deterrence. Lengthy maximum sentences for repeat offenders already exist for most federal sex offenses, and the new wave of sex offender registration statutes will provide lifetime government monitoring of violent sex offenders in nearly all states. Such draconian measures are not an appropriate response to the problem of recidivism.

Section 202, which removes the statute of limitations for all felony sex offenses, is equally well-intended but misguided. Removing the statute of limitations from sex offenses would be a serious violation of an accused person's due process. Decades or even years after an offense, witnesses become hard to find, memories become fuzzier. Innocent defendants will likely find it difficult if not impossible to defend against sex abuse charges, where a victim's uncorroborated testimony is enough to convict and where alibi witnesses and other favorable evidence to the defense may not be easily found so many years after an alleged incident. Because of this, the law actually creates a perverse incentive for false accusers to wait several years before making an allegation of sexual abuse. As the Supreme Court stated in *United States* v. *Marion* in 1971:

> Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[13]

Removing the statute of limitations for all felony sex offenses, including consensual acts against minors, is also disproportionate to the crimes involved and makes little sense given the strict statutes of limitations that exist for other violent felonies. Nearly all non-capital criminal offenses have a statute of limitations of five years.[14] Even non-capital terrorism cases have only an 8-year statute of limitations.[15] On a side note, the advent of DNA evidence and its ability to point the accusatory finger at a suspect years after a crime is not a sufficient justification to abandon all statutes of limitations in sex cases. DNA is used just as often in other non-capital crimes such as arson or manslaughter, and is subject to problems of evolving science, tampering and contamination.

Section 221 of the Bill, which imposes a presumption of no pretrial release for those accused of sex crimes against a minor, is also a disproportionate and overly broad response to the problem of sexual abuse. The proposed law covers those accused of nonviolent, consensual sex with a minor, but does not cover many other violent non-sexual offenses. In truth, there is nothing about the population of sex offenders that would suggest that they are more of a flight risk or an immediate danger to the community than other types of offenders, especially violent offenders. Drug crimes, in contrast, are treated differently under current law because they often involve addicts, whose behavior may be more compulsive and nonresponsive to deterrence measures, and because drug offenders often have access to large amounts of cash, and are therefore a potential flight risk. On a broader note, judges should be given the discretion to determine when a person's circumstances do not merit pretrial detention, often for period of several months or years. Charged sex offenders are not merely persons accused of a crime; they are also often mothers,

---

[11] 18 U.S.C. § 2244 prohibits sexual contact with another person without permission, ordinarily a six-month offense. If committed against a person younger than 16, nonconsensual sexual contact becomes a two-year offense. § 2244(a)(3). When committed against anyone under 17, § 2244 offenses are covered under Section 106 "two strikes" provision.

[12] 18 U.S.C. § 2243 prohibits consensual sexual acts with persons under age 16, when the victim is four years younger than the offender.

[13] 404 U.S. 307, 323 (1971).

[14] *See* 18 U.S.C. § 3282.

[15] *See* 18 U.S.C. § 3286.

fathers, husbands, wives, caretakers for elderly relatives, and valuable and productive employees. We believe the current pretrial detention statute strikes the appropriate balance between protecting the rights of the accused, the needs of those employers and family members who rely on the defendant, and the safety of the community.

In sum, we urge the Subcommittee to vote against this Bill as it is currently written. If passed, its provisions will create grossly disproportionate sentencing and pretrial detention schemes, will unconstitutionally assert jurisdiction over sex crimes committed on foreign soil that have no demonstrated connection to interstate or foreign commerce, will authorize a sentence of death for conduct meeting only a "recklessness" standard of intent in violation of well-established principles of criminal responsibility, and will allow prosecutions for sex offenses allegedly committed decades earlier, in a manner that seriously impairs an accused person's ability to present affirmative evidence of innocence.

I appreciate the opportunity to address this Committee. It is especially significant as we are on the eve of *Gideon*'s 40th anniversary. As such, we ask that this committee ensure that another 40 years do not pass without *Gideon* satisfying its aspirations. Toward that end, whenever the Congress authorizes resources for prosecutorial agencies, it should authorize proportional resources for public defense. Only then will the criminal justice system be in balance. Providing disproportionate resources, however, to one part of the system has the potential of creating massive inefficiencies. In Oregon, for example, cuts in public defense funding caused a shut down of criminal arraignments across the entire state. Hundreds of arrestees had to be released until July, when funded defense representation again would be available.

Gideon sets a goal that this Congress and this country can, and must, achieve. Appropriate funding for the defense function will go a long way toward achieving that goal.

Thank you for your time and consideration.

Mr. COBLE. Thank you, Mr. Sullivan. And when I mentioned the 5-minute rule, gentlemen, as you all know, your written testimony has been examined and will be re-examined. We do the 5-minute rule because on this Hill time is precious, and time is precious for you all as well.

Mr. Feldmeier, you will discuss the Child Obscenity and Pornography Prevention Act.

STATEMENT OF JOHN P. FELDMEIER, SENIOR ASSOCIATE, SIRKIN, PINALES, MEZIBOV & SCHWARTZ LLP

Mr. FELDMEIER. Thank you, Mr. Chairman. Good afternoon, Mr. Chairman and distinguished Members of the Subcommittee. Having spent much of the last 6 years addressing the constitutional deficiencies of the Child Pornography Prevention Act of 1996, portions of which were struck down by the Supreme Court last year in *Ashcroft* v. *Free Speech Coalition*, I appreciate the invitation to appear on behalf of the Free Speech Coalition and to have the opportunity to discuss H.R. 1161, the proposed Child Obscenity and Pornography Prevention Act of 2003.

Unfortunately, we believe that H.R. 1161, like its predecessor, creates an unconstitutional ban on protected rights of expression and improperly denies the criminally accused their fundamental right to due process.

The Supreme Court has repeatedly held that non-obscene material depicting adults engaged in sexual activity—whether in the form of printed material, film, or computerized images—is protected by the First Amendment. Consistent with this holding, the Court has made it clear that the Government's interest in regulating and defining child pornography, as compelling as it may be,

is limited to works that visually depict sexual conduct of actual children.

The persistent disregard for these and other constitutional warnings has led to the invalidation of several pieces of legislation and, in the recent case of *Ashcroft* v. *Free Speech Coalition*, resulted in the Government being awarded to pay the attorney's fees and expenses of the prevailing party.

By defining child pornography to include images that are "indistinguishable from real children," H.R. 1161 ignores the Supreme Court's firmly established precedent that sexually explicit speech, which is neither obscene nor the product of sexual abuse of real minors, retains protection under the First Amendment, and the Government may not suppress lawful speech as a means to suppress unlawful speech.

By failing to adhere to these and other unmistakably clear constitutional standards, we believe that H.R. 1161, if not modified, is certain to join the ranks of the Child Pornography Prevention Act and other constitutionally deficient legislation that ultimately offers no real help to the real children who are in need of protection.

The Government claims that H.R. 1161 is necessary for prosecutors to meet their evidentiary burden in child pornography cases and to prevent the guilty from being acquitted. These claims, however, are largely overstated and have been rejected by the Supreme Court.

The acquittal rate in all child pornography cases, regardless of the defense employed, is remarkably low. According to the Department of Justice Executive Office for United States Attorneys, there were 2,091 child pornography cases initiated by the Federal Government between the years of 1992 and 2000. In only 10 of these cases was the defendant acquitted. This equates to an acquittal rate of only 0.47 percent. More revealing is the fact that none of these acquittals are reported as being the result of the so-called virtual child defense which forms the Government's primary basis for H.R. 1161.

The factual insufficiency of the Government's evidentiary claim is compounded by the fact that the Supreme Court has already rejected this claim on constitutional grounds, ruling that it turned the First Amendment upside down and amounted to a claim that protected speech may be prohibited as a means to ban unprotected speech.

The Court has also chastised the Government for attempting to avoid its burden of proof in child pornography cases through the so-called affirmative defense, which effectively switches the burden of proof to the criminally accused. The Court observed that if the evidentiary burden as to whether an image depicts a real minor is as serious a problem for the Government, as it asserts, it will be at least as difficult for the innocent defendant.

In conclusion, I want to emphasize that in challenging the constitutionality of H.R. 1161, the Free Speech Coalition does not in any way seek to minimize the serious harms of child pornography. Pornography depicting actual minors does real harm to real children. However, in attempting to address the true evils of child pornography, we urge Members of the Subcommittee to be mindful of the fundamental rights of all individuals under the Constitution

and to resist the—and to resist compromising protected forms of expression in order to punish illegal forms of conduct.

I want to thank you for holding this hearing and for considering our views on the matter.

[The prepared statement of Mr. Feldmeier follows:]

PREPARED STATEMENT OF JOHN P. FELDMEIER

Mr. Chairman, Ranking Member Scott, and Distinguished Members of the Subcommittee:

Having spent much of the last six years advocating against the constitutional deficiencies of the "Child Pornography Prevention Act of 1996" (CPPA), portions of which were held unconstitutional by the Supreme Court in 2002, I am pleased to appear on behalf of the Free Speech Coalition and to have the opportunity to discuss the House of Representative's recent effort to remedy the unconstitutional portions of the CPPA through H.R. 1161, the proposed "Child Obscenity and Pornography Prevention Act of 2003" (COPPA). Unfortunately, I regret to report that, while COPPA contains some improvements on the fatally-flawed CPPA, it nevertheless constitutes another patently-deficient ban on constitutionally-protected rights of expression and due process.

I. INTRODUCTON AND OVERVIEW

COPPA's primary defects stem largely from its persistent disregard of four time-honored and constitutionally-mandated principles relating to the Government's regulation of free expression and its obligation to provide criminal defendants due process:

(1) COPPA ignores the fundamental principle that "[sexually-explicit] speech that is neither obscene nor the product of sexual abuse [of a real minor] retains protection of the First Amendment." *Ashcroft* v. *The Free Speech Coalition*, 122 S.Ct. 1389, 1402 (2002); *see also New York* v. *Ferber*, 458 U.S. 747, 764–65 (1982).

(2) COPPA disregards the firmly established principle that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech [and thus] [p]rotected speech does not become unprotected merely because it resembles the latter." *Free Speech Coalition,* 122 S.Ct. at 1404; *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973) ("the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. . . .").

(3) COPPA fails to adhere to the constitutional requirement that, in all obscenity cases, the Government must prove that the work, taken as a whole, appeals to the prurient interest in sex, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *See Miller* v. *California*, 413 U.S. 15, 24 (1973); *Free Speech Coalition*, 122 S.Ct. at 1399.

(4) Portions of COPPA violate due process principles that "protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970); *see also Sandstrom* v. *Montana*, 442 U.S. 510, 525 (1979) (prosecution must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by creating a presumption); *Patterson* v. *New York*, 432 U.S. 197, 215 (1977) (defendant's due process rights violated when a presumption requires him to prove that he acted in the heat of passion upon sudden provocation).

By failing to adhere to these and other constitutional principles, COPPA, if not modified, is certain to join the ranks of the CPPA and other constitutionally-deficient legislation that ultimately offers no real help to the real children who are in need of protection.

II. THE CONSTITUTIONAL FRAMEWORK FOR CHILD PORNOGRAPHY LEGISLATION

For over two decades, the Supreme Court has made it clear that the Government's interest in regulating and defining child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *Ferber*, 458 U.S. at 764 (footnotes omitted). Although the Court has classified child pornography as speech unprotected by the First Amendment, the Court has

specifically endorsed the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *Id.* Accordingly, the Court has made it clear that Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct by actual children. *Id.* at 764.

This well-defined interest in regulating child pornography was reinforced by the Final Report issued by the Attorney General's Commission on Pornography in 1986. Attorney General's Commission on Pornography, Final Report at 405–418, 595–735 (July 1986) [hereinafter Final Report or Report]. The Report examined the effect of sexually explicit, "fictional" depictions of children and concluded that these depictions should not be considered "child pornography." Final Report, 596. Consistent with *Ferber,* the Report cautioned that the term "child pornography" is "only appropriate as a description of material depicting *real* children." *Id.* at 597 (footnote omitted). By way of example, the Report concluded that a sexually explicit film adaptation of Vladimir Nabokov's novel, *Lolita*, which uses an adult actress to play the part of a young girl, "could never be 'child pornography'" because it does not depict an actual child engaged in sexual conduct. *Id.* at 598. In this Report, the Commission noted, "[i]t is clear from the Court's language [in *Ferber*], and in all statutory and scholarly definitions of the term, that 'child pornography' *is only appropriate as a description of material depicting real children*." Final Report at 597 (emphasis added). The Commission further stated that sexually explicit material that uses adults to depict sexual activity by a child *"could never be 'child pornography'"* because it does not depict an actual child engaged in sexual conduct. *Id.* at 598 (emphasis added). The Report therefore cautioned legislators not to "'burn the house to roast the pig.'" *Id.* at 411 n.74 (citing *Butler* v. *Michigan*, 353 U.S. 380, 383 (1957)).

The limitations placed on Congress when regulating child pornography are necessary to ensure that, in the process of protecting children, the rights of adults do not get left behind. As the Supreme Court has frequently explained, the Government cannot "reduce the adult population . . . to reading [and viewing] only what is fit for children." *Butler,* 353 U.S. at 383. Consistent with this admonition, the Court has repeatedly held that non-obscene material depicting non-children engaged in sexually explicit conduct, whether in the form of printed material, film, telephone communications, computerized images, or live performances, is protected by the First Amendment. *Free Speech Coalition,* 122 S.Ct. at 1402; Ferber, 458 U.S. at 764–65.

The failure to adhere to this and other constitutional tenets when drafting "child protection legislation" has resulted in numerous measures being declared unconstitutional. *See Free Speech Coalition,* 122 S.Ct. at 1402 (CPPA's "appears to be a minor" and "conveys the impression of a minor" provisions); *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 874–76 (1997) (indecent images on the Internet); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (nude dancer performing in an adult bookstore); *Sable Communications*, 492 U.S. at 126 (indecent "dial-a-porn" telephone communications); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 211–12 (1975) (motion pictures exhibiting nudity); *Kois* v. *Wisconsin*, 408 U.S. 229, 231–32, (1972) (sexually explicit poetry); *Butler*, 352 U.S. at 383–84 (books deemed harmful to children).

Most recently, under the CPPA, Congress attempted to expand the definition of "child pornography" to include materials that contain sexually explicit depictions that "appear to be minors" and materials that are advertised to "convey the impression" that minors are depicted. This legislation was enacted despite protests by several members of Congress and numerous constitutional scholars who viewed these provisions as unconstitutional restrictions on protected speech. Congress was repeatedly warned that the bill would not pass constitutional muster because, "[b]y criminalizing all visual depictions that 'appear to be' child pornography—even if no child is ever used or harmed in its production—[the CPPA] prohibits the very type of depictions that the Supreme Court has explicitly held protected." S. Rep. No. 358, at 29 (1996). Numerous constitutional scholars advised Congress that the CPPA ultimately would be found unconstitutional, thereby rendering it useless in the battle against child pornography. *Id.*

In the end, the Government's blatant disregard for these constitutional warnings caused not only the invalidation of the CPPA's primary provisions, but also resulted in the Government being ordered to pay the attorney's fees and expenses of the prevailing party under the Equal Access to Justice Act. *Free Speech Coalition* v. *Ashcroft*, No. C9700281 WHA (N.D. Calif., filed February 7, 2003) (order awarding attorney's fees and expenses). In issuing its order for fees and expenses, the district court in *Free Speech Coalition* found that: (1) "the constitutional flaw in the CPPA

was recognizable from the start," (2) "there was not a solid constitutional basis for the statute, as written, in the first place," and (3) "the full scope of the CPPA was not justified in substance or in the main." *Id.* at 6. Accordingly, the court held that the Government's position in supporting the CPPA was not "substantially justified in law and in fact," and thus, the prevailing party was entitled to the payment of attorney's fees and expenses.

In light of the Government's failed efforts under the CPPA, and given the clear and consistent constitutional standards set forth by the Supreme Court regarding child pornography legislation, Congress' interest in regulating child pornography is, and must continue to be, limited to regulating: (1) sexually explicit materials depicting or using real children, and (2) materials that are deemed obscene. Because many of COPPA's provisions, as currently drafted, run afoul of these and other clearly defined constitutional limitations, they are likely to suffer the same fate as the CPPA.

III. COPPA'S CONSTITUTIONAL DEFICIENCIES

A. Section 2256(8)(B)—An expanded definition of child pornography

Under Section 2256(8)(B), COPPA defines child pornography to include a visual depiction that "is a digital image, computer image, or computer-generated image that is, *or is indistinguishable from*, that of a minor engaged in sexually explicit conduct." (Emphasis added). Because the phrase "indistinguishable from . . . a minor" is likely to ensnare sexually explicit depictions of youthful-looking adults and computer-generated images of nonchildren, this provision suffers from the same overbreadth problem as the "appears to be" and "conveys impression" provisions of CPPA because it bans images that do not depict real children. *See Free Speech Coalition,* 122 S.Ct. at 1401–1406.

COPPA's "indistinguishable" provision directly contravenes the Supreme Court's holdings in *Free Speech* and *Ferber*, which establish and reinforce that the Government's interest in regulating and defining child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *Ferber,* 458 U.S. at 764 (footnotes omitted); see also *Free Speech Coalition*, 122 S.Ct. 1402 (sexually explicit speech that is neither obscene nor the product of sexual abuse, retains First Amendment protection). The Court has specifically endorsed the use of nonchildren in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *Ferber,* 458 U.S. at 764. And, accordingly, the Court has made it clear that Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct *by actual children*. *Id.* at 764 (emphasis added).

The Court has also emphasized that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech[]" and that "[p]rotected speech does not become unprotected merely because it resembles the latter." *Free Speech Coalition,* 122 S.Ct. at 1404. But despite the Court's clear admonition, this is precisely what COPPA is attempting to do by banning sexually explicit depictions of images of nonchildren that are indistinguishable from real children.

In short, because an image that is "indistinguishable" from that of a minor engaged in sexually explicit conduct does not depict an actual child, nor does it necessarily depict obscenity, "it does not fall outside the protection of the First Amendment." *Free Speech Coalition,* 122 S.Ct. at 1402.

The purported justification for the "indistinguishable" provision is to afford prosecutors the ability to combat the potential defense raised by those charged with child pornography offenses that the charged material depicts "virtual children," including youthful-looking adults and computer-generated images. (H.R. 1161, legislative findings 6–13). The Government contends that federal prosecutors have struggled to secure convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually explicit materials is an actual child. The Government speculates that, if prosecutors continue to struggle to meet their burden of proof, child pornographers might be able to avoid conviction. These claims, however, are grossly exaggerated and were rejected by the Supreme Court in *Free Speech Coalition.*

First, it should be noted that, of all the 2091 child pornography cases initiated by the Government between 1992 and 2000, only 10 defendants, regardless of what defense strategy they employed, were acquitted. Dept. of Justice, Executive Office for United States Attorneys, "Review of Child Pornography and Obscenity Crimes," Report No. I–2001–07, Table 3, "Child Pornography Conviction Statisics." This amounts to a remarkably-low acquittal rate of only 0.4%. Even more telling is that none of these acquittals are reported as being based on the so-called "virtual child" defense. *Id.* In addition, the legislative findings supporting the CPPA did not offer

a single child pornography case where the Government was unable to satisfy its burden of proof at trial because the accused raised a "virtual child" defense. The only case cited in these findings was *United States* v. *Kimbrough*, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996), *see* S. Rep. No. 358, at 17. And in that case, the defendant was convicted. Moreover, during the course of the *Free Speech Coalition* litigation from 1997 to 2002, the Government cited four additional cases, which were not included in the legislative findings, where defendants had purportedly argued that "the pictures they were accused of possessing were not of real children." Government's Supreme Court Merit Brief 37–38, fn. 8. But the Government failed to show that the defendants escaped conviction in any of these cases. Thus, factually speaking, the Government's claim of difficulty in securing convictions in child pornography cases due to the availability of the "virtual child" defense is far from compelling.

In addition to the factual deficiencies of the Government's claim, the legal basis for the "indistinguishable" provision is likewise deficient. In *Free Speech Coalition, the Supreme Court considered the Government's claims that the CPPA's "appears to be" and "conveys the impression" provisions were necessary because "computer imaging makes it very difficult for it to prosecute those who reproduce pornography by using real children." Free Speech Coalition, 122 S.Ct. at 1404. The Court, however, rejected this argument, ruling that it "turn[ed] the First Amendment upside down" because it amounts to an argument that "protected speech may be banned as a means to ban unprotected speech." Id.* The Court continued, stating, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech [and thus] [p]rotected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Id.*

Plainly stated, COPPA's "indistinguishable" provision is unconstitutionally overbroad and is not support by any compelling governmental interest. As such, it should be excised from the body of the bill.

B. Section 2252A(c)(1)—Affirmative Defense

COPPA attempts to limit the overbreadth problems of the "indistinguishable" provision by providing an affirmative defense to those charged under Section 2256(8)(B). This "defense" requires a defendant to show that "the production of the alleged child pornography did not involve the use of a minor or an attempt or conspiracy to commit an offense under this section involving such use." Section 2252A(c)(1).

In essence, under Section 2252A(c)(1), all the Government has to do in a child pornography case is prove that the charged material contains an image that is "indistinguishable" from that of a minor engaged in sexually explicit conduct. Once this is done, the burden of proof shifts to the defendant who is then responsible for proving that the image is not of an actual child. As with the CPPA's affirmative defense, COPPA's defense "raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Free Speech Coalition, 122 S.Ct. at 1404.*

COPPA's affirmative defense creates the presumption that, if the image is indistinguishable from a real minor, it is in fact a real minor. This presumption, however, unconstitutionally relieves the government of its burden of proof on an essential element of the offense. *See X-Citement Video, Inc.* 513 U.S. at 78 (prosecution required to prove defendant knew material was produced with the use of a minor); *Sandstrom* v. *Montana*, 442 U.S. 510, 525 (1979) (criminal jury instructions presuming a person intends the ordinary consequences of his voluntary act denies defendant due process); *Patterson* v. *New York*, 432 U.S. 197, 215 (1977) (defendant's due process rights violated when a presumption requires him to prove that he acted in the heat of passion upon sudden provocation).

It further ignores the reality that most defendants lack the resources or ability to prove that a "fictional" character is not a real minor. If the government, with its seemingly-infinite resources, is purportedly having trouble proving that a depiction is that of a real minor (Legislative findings 8, 9, 10, 11), then how can criminal defendants, many of whom are indigent, be expected to do so? Plainly, "if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor." *Free Speech Coalition, 122 S.Ct. at 1404–1405. And in the context of a criminal trial, it is patently unfair, unreasonable, and unconstitutional to afford the Government a "close-enough" standard in child pornography cases, while requiring defendants to demonstrate with precision the non-minor status of the person depicted. This turns the most basic premise of our criminal justice system—that a person is innocent until proven guilty—on its head.*

The affirmative defense also offers little protection to consumers and distributors who are not involved in the production of sexually explicit materials, and thus, have

little or no way of knowing whether persons depicted in the materials are minors or, in some cases, real persons. *See Free Speech Coalition,* 122 S.Ct. at 1404–1405. This problem is compounded by the fact that COPPA applies to all materials currently available and makes no concessions for the time period in which the material was produced. Thus, if individuals or retailers are prosecuted for possessing or distributing materials produced in the 1970s, prior to the enactment of federal record-keeping laws, which were not instituted until 1988, see 18 U.S.C. §2257, it would be nearly impossible for most defendants to prove that the persons depicted in the materials were adults at the time the materials were produced. *Id.*

Finally, it is important to note that the Government's current burden of proof in child pornography cases is not as challenging as the Government may claim. *See United States* v. *Vig.*, 167 F.3d 443, 450 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999) (rejecting defendant's claim that, because the only evidence the government presented to show that the images were of real children were the images themselves, the government failed to meet its burden of proof and ruling that government is not "required to negate what is merely unsupported speculation . . . [p]roof beyond a reasonable doubt does not require the government to produce evidence which rules out every conceivable way the pictures could have been made without using real children."); *United States* v. *Nolan*, 818 F.2d 1015, 1020 (1st Cir.1987) (finding that uncorroborated speculation that technology exists to produce pornographic pictures without use of real children is not a sufficient basis for rejecting the lower court's determination to admit evidence). The 0.4% acquittal rate for defendants in *all* federal child pornography cases between 1992 and 2002 is more than adequate to support this fact. *See* Dept. of Justice, Executive Office for United States Attorneys, "Review of Child Pornography and Obscenity Crimes," Report No. I–2001–07, Table 3.

Simply put, in addition to the fact that COPPA's affirmative defense provision allows prosecutors to deny defendants the due process of law by unconstitutionally shifting the burden of proof in child pornography cases, it is simply not needed in order for prosecutors to continue their remarkable rate of success in child pornography cases.

C. Section 2252B—Pandering and Solicitation

COPPA also seeks to ban two additional categories of expression, which are classified as "pandering" and "solicitation." Under proposed Section 2252B(a), COPPA provides that "[w]hoever in [an interstate commerce setting] offers, agrees, attempts, or conspires to provide or sell a visual depiction to another, and in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction *with the intent to cause any person to believe* that the material is, or contains, a visual depiction of an actual minor engaging in sexually explicit conduct shall be subject to penalties set forth in 2252A(b)(1)." (Emphasis added). Under proposed Section 2252B(b), COPPA provides that "whoever offers, agrees, attempts, or conspires to receive or purchase from another *a depiction that he believes to be*, or to contain, a visual depiction of an actual minor engaging in sexually explicit conduct is subject to penalties set forth in section 2252A(b)(1)." (Emphasis added).

These pandering and solicitation provisions allow criminal culpability to be based primarily on the beliefs or thoughts of the provider or recipient. Under Section 2252B(a), culpability depends on the message conveyed ("cause any person to believe that the material is, or contains, a visual depiction of an actual minor"). Under Section 2252B(b), culpability depends on the message received ("a visual depiction that he believes to be, or to contain, a visual depiction of an actual minor"). Regardless of the actual content of the material, a person could be charged and convicted for child pornography violations simply because he advertised or solicited the material with the suggestion or belief that the material depicted an actual minor engaging in sexually explicit conduct. As a result, a person selling, advertising, or purchasing material that contains no actual child pornography can be convicted as if the material contained sexually explicit depictions of actual children. This improperly elevates form over substance, and wrongly punishes individuals merely for their thoughts and beliefs. As the Supreme Court has stated, "First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition, 122 S.Ct. at 1403.*

By basing criminal culpability on a person's beliefs or thoughts, COPPA suffers from the same defect as the CPPA's "conveys the impression" provision. Although the Supreme Court has recognized that "pandering may be relevant as an evidentiary matter, to the question of whether particular materials are obscene," *Free Speech Coalition, 122 S.Ct. at 1406 (citing Ginzburg* v. *United States*, 383 U.S. 463

(1966), COPPA's provisions far exceed this constitutional standard. Rather than allowing the form in which materials are provided or received to *inform* the question of whether the materials are obscene, COPPA allows the form to be *dispositive* of the question of whether the material contains child pornography. In other words, "it requires little [or no] judgment about the content of the image." *Id.* at 1405.

To make matters worse, COPPA's pandering and solicitation provisions are not limited to sexually explicit, erotic, or commericially exploited materials. Rather, these provisions apply to any "visual depiction." The Supreme Court has held that "where a defendant engages in *'commercial exploitation' of erotica* solely for the sake of their prurient appeal, the context he or she creates may itself be relevant to the evaluation of the materials." *Free Speech Coalition, 122 S.Ct. at 1406 (citations omitted)(emphasis added). But here, COPPA offers no such restriction. Consequently, materials containing absolutely no sexually explicit material whatsoever can now be prosecuted as child pornography simply based on the impure thoughts of the provider or recipient.*

COPPA's pandering and solicitation provisions can be remedied by doing the following: (1) limit the materials subject to COPPA's provisions to those of a sexually explicit nature; (2) limit these provisions to cases where "commercial exploitation" is present; and (3) rather than making the thoughts and beliefs of providers and recipients dispositive of the content of the materials, permit the form in which materials are transferred or received to be relevant, as an evidentiary matter, as to whether the materials are obscene. *Free Speech Coalition, 122 S.Ct. at 1405.*

D. Section 1466A—Obscene visual depictions of young children

Under proposed Section 1466A, COPPA attempts to create the equivalent of a per se obscenity standard by banning a "visual depiction that is, *or is indistinguishable from*, that of a prepubescent child engaging in sexually explicit conduct." (Emphasis added). This provision includes computer or computer generated images whether made by electronic, mechanical or other means. Section 1466A(c)(1).

As with the "indistinguishable" provision proposed in Section 2256(8)(B), 1466A's "indistinguishable" provision directly contravenes the Supreme Court's holdings in *Free Speech* and *Ferber*, which, again, establish and reinforce that the Government's interest in regulating and defining child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *Ferber,* 458 U.S. at 764 (footnotes omitted); *see also Free Speech Coalition,* 122 S.Ct. 1402 (sexually explicit speech that is neither obscene nor the product of sexual abuse, retains First Amendment protection). Regardless of the apparent prepubescent age of the person depicted, the Court has made it clear that "where speech is neither obscene nor the product of sexual abuse [of a real minor], it does not fall outside the protection of the First Amendment." *Free Speech Coalition, 122 S.Ct. 1403 (citing Ferber*, 458 U.S. at 764–65).

Although 1466A is entitled "Obscene visual depictions of young children," it fails to include any requirement that the material be obscene or incorporate the requisite constitutional standards for prosecuting obscenity. Under *Miller* v. *California*, 413 U.S. 15, 24 (1973), in order to prove that a material is obscene, the Government must prove that, applying contemporary community standards, the work, taken as a whole, appeals to the prurient interest in sex, is patently offensive, and lacks serious literary, artistic, political, or scientific value. *See also Free Speech Coalition,* 122 S.Ct. at 1399. By failing to incorporate these elements, Section 1466A impermissibly prohibits speech without regard to its appeal to a prurient interest in sex, its level of offensiveness, or its serious literary, artistic, political, or scientific value. *Id.* at 1400. As a result, 1466A "applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse," *Free Speech Coalition, 122 S.Ct. at 1400, both of which are not intended to be, nor actually are, obscene.*

Section 1466A(d) provides an affirmative defense, which requires a defendant to possess less than three images and to promptly and in good faith, and without retaining or allowing another person to access, take reasonable steps to destroy and report to law enforcement. But this provision does not remedy the deficiencies of the provision because it seeks to "protect" speech by requiring it to be destroyed and fails to account for any serious literary, artistic, political, or scientific value of the targeted materials. *Id.* at 1400.

Given the Government's existing obscenity statutes, see 18 U.S.C. §§ 1460–1466, one may question whether an additional obscenity provision regarding obscenity of prepubescent images is really necessary. But, to the extent that it is, as a remedy to the unconstitutional portions of 1466A, the "indistinguishable" language should be removed and *Miller*'s obscenity standards should be incorporated.

E. Section 1466B—Obscene visual representations of sexual abuse of minors

Sections 1466B(a) and (b) collectively propose another obscenity measure that bans the production, distribution, receipt, possession with intent to distribute, or possession of an obscene visual depiction of a minor engaging in sexually-explicit conduct. Under 1466B(c), the Government is not required to prove that the minor child depicted actually exists.

To the extent that Section 1466B requires the targeted material to be obscene, this ostensibly satisfies the constitutional standard under *Miller*. As a result, even in cases where the image is not that of a real minor, the Government must still prove that the work, taken as a whole, satisfies the three elements under *Miller*. However, in cases under Section 1466B(b), which prohibits the mere possession of obscene materials, even in a person's own home, where the materials do not depict a real child, mere private possession of such materials should be protected. *See Stanley* v. *Georgia,* 394 U.S. 557 (1969) (First Amendment prohibits making mere private possession of obscene material in one's own home a crime). Under this scenario, the material at issue is not child pornography because it does not depict a real child, and thus, the only basis for prosecuting the material is that it is obscene.

IV. CONCLUSION

In challenging the constitutionality of COPPA, the Free Speech Coalition does not mean to minimize the serious harms of child pornography. Pornography depicting actual minors does real harm to real children. However, in attempting to address the true evils of child pornography, we urge members of Congress to be mindful of the fundamental rights of all individuals under the First Amendment and to resist attacking protected forms of expression in order to punish illegal forms of conduct. In other words, we ask that Congress not "burn the house to roast the pig." *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957).

Thank you for holding this hearing and for considering our views on this matter.

Mr. COBLE. Thank you, sir. Thanks to all the witnesses again. Start my time there.

Mr. Collins, as to 1104, the legislation contains a number of new or increased mandatory minimum penalties, which your testimony states is responsive to real problems of excessive leniency in sentencing under existing laws. Give us an example of that leniency and why these mandatory minimums are necessary.

Mr. COLLINS. Yes, Mr. Chairman. In our written statement——

Mr. COBLE. And keep in mind, Mr. Collins, I have 5 minutes, too, so if you can make your questions fairly brief.

Mr. COLLINS. In our written statement, we detailed the increase in the rate of downward departures from the guidelines, that the tough sentences that have been prescribed for these offenses are simply not being enforced. We gave some examples of particularly creative grounds of downward departure, and that is a pattern that we have seen and is detailed in the written statement.

Mr. COBLE. Let me ask each of you gentlemen, do you all believe that the Government has a compelling interest to maintain its ability to enforce the laws against child pornography using real children? Each of you, the three of you.

Mr. COLLINS. Yes, Mr. Chairman, we believe that that's the core of the compelling interest that is sought to be protected by H.R. 1161.

Mr. FELDMEIER. Yes, Mr. Chairman. In cases involving real children who are depicted in pornographic materials, we do believe, consistent with the Ferber decision, that the Government does have a compelling governmental interest in protecting children.

Mr. COBLE. Mr. Sullivan?

Mr. SULLIVAN. Yes, with respect to real children, I agree with my colleague.

Mr. COBLE. Mr. Collins, 1161 contains an affirmative defense. For the record, if you would, explain what constitutes an affirmative defense in the criminal law, A; B, whether there are other affirmative defenses available in Federal law; and, C, whether this affirmative defense shifts the prosecutor's burden of proof, which is beyond a reasonable doubt, to the defendant.

Mr. COLLINS. The statute that's proposed by 1161 would define certain elements of the offense. Then it would allow an affirmative defense, and here it's a true affirmative defense. There isn't a presumption with respect to an element that's then rebutted. The elements are defined and specified. The affirmative defense is different.

There are other affirmative defenses in the law such as insanity, self-defense, duress, and the limits imposed by the Due Process Clause are essentially that the legislature has considerable discretion in defining the elements of an offense, subject to basically not infringing on fundamental rights. For the reasons we've explained, we don't think it violates the First Amendment to define the case-in-chief and the elements of that offense in the way that this bill does. And, in fact, by providing the affirmative defense, it basically complies with the Supreme Court's directive and ensures that the bill is as narrowly tailored as possible by excluding from the prohibition those cases in which the defendant has available to him evidence to show that the Government's compelling interest is not implicated in that case.

Mr. COBLE. Well, how about the shifting of burden?

Mr. COLLINS. There's no shifting of burden in this bill, strictly speaking, because it does not rely on a presumption. And that's why my colleagues here are mistaken in claiming that there's a shifting of the burden.

What it says is that the Government's compelling interest in maintaining the enforceability of the child pornography laws is threatened by trafficking in decoy images, as it were, lifelike images that are so real that to the naked eye you could not tell them apart; and that persons who traffic in those images will need to be careful that they will be able to verify how they were established. But there's no technical shifting of the burden.

Mr. COBLE. Finally, Mr. Collins, because my time is about out, is the definition of child pornography constitutional? Because the opponents would say no, tell me why it is, if you concur that it is. I think you do.

Mr. COLLINS. We do, and the reason why the Court said that the virtual provision at issue in the prior case did not fall within Ferber's categorical exclusion. Ferber categorically excludes from the First Amendment any materials that can be shown to have made—be made with children. What the Court left open—that was part two of its decision. In part three of its decision, it left open the possibility that because of the concern about enforceability of the child pornography laws and the Government's compelling interest there, that the Government may have the ability to reach a somewhat broader category of speech, including virtual images, some subset of those images, in order to protect that compelling interest. Justice Thomas specifically noted in his concurrence that

the Court was leaving open the option of reaching those images with a broader affirmative defense.

Mr. COBLE. I see my red light up here, so thank you, gentlemen.

Mr. SCOTT. Can somebody else answer that?

Mr. COBLE. Does anyone else want to weigh in on this?

Mr. FELDMEIER. Yes, Mr. Chairman. We believe that the current proposal——

Mr. COBLE. No, it is alright.

Mr. FELDMEIER [continuing]. To expand the definition—and I do believe it's a radical expansion—consistent or at least on the level of that done under the Child Pornography Prevention Act of 1996. The term "indistinguishable from a real child" is the equivalent of "appears to be of a real child." And for the same reasons that the Supreme Court struck down that provision in the Free Speech Coalition case——

Mr. COBLE. Mr. Feldmeier, keep in mind, as briefly as you can.

Mr. FELDMEIER. Thank you. It would likely do the same here with this indistinguishable vision.

Mr. COBLE. Alright. The gentleman from California is recognized for 5 minutes.

Mr. SCHIFF. I thank the Chairman for yielding.

I have two questions I'd like to pose to Mr. Sullivan and Mr. Feldmeier. The first pertains to a new provision in the bill that wasn't present last year, and that is for the de novo review of departures from Sentencing Guidelines. The point is made that there are more frequent and more extreme departures from the guidelines in child pornography cases than in many others, and I'd like to get your thought about why that may—whether you agree that that is the case and, if so, what the cause of that might be, whether it's a reflection of judges' disagreeing with the severity of the sentences or it's a reflection of there being a wider variety of degradations, of different kinds of cases within this crime as opposed to other crimes. I'd like to get your thoughts on why that might be the case.

And the second question I have is: This provision goes well beyond child pornography. It applies to—across the board to any crime in terms of changing the standard of review. I'd like to get your thought about whether that's desirable or undesirable. Certainly at the trial court level, it will be viewed as a further encroachment on what little discretion they have remaining. But if, in fact, the court of appeals has de novo review, is it really a limitation on the discretion of the judges or merely a restriction on the discretion of the trial judges where the appellate judges still have the same discretion contemplated in the guidelines. That's the first issue that I wanted to raise with you.

The second issue is on affirmative defense, and in Free Speech, the Court said, "We need not decide whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient on its own terms."

That has been addressed in the bill, and the question I have, if I could pose it to you as a constitutional scholar not as an advocate: Didn't the Court explicitly leave open what this bill does without answering the question? And if you accept as a premise that tech-

nology either now or very soon will make it literally impossible to tell real from virtual, isn't there a sufficiently compelling interest here and the flexibility left open by the Supreme Court to address that in the most narrow fashion possible by using an affirmative defense. Defining it as indistinguishable, I mean, I don't know how you can more narrowly define it than that. Wasn't this explicitly left open by the Court and would be, therefore, an open constitutional question?

Mr. FELDMEIER. If I could answer the second question first, Congressman, I don't believe the door is that wide open for another effort to refashion an affirmative defense. I think the majority opinion in Free Speech Coalition made it clear that the problem with an affirmative defense is that it does, in fact, shift the burden of proof to the criminally accused because it requires them to go into the issue of whether the image depicted is that of a real child.

The inconsistency here is——

Mr. SCHIFF. Was Free Speech a 5-4 decision?

Mr. FELDMEIER. No, there was a five-member majority. Justice Thomas concurred; Justice O'Connor concurred, and dissented in part; and then there was a dissenting opinion from Justice Scalia and Chief Justice Rehnquist.

Mr. SCHIFF. Well, if Justice Thomas concurred, Justice Thomas in his concurring opinion referred to the fact that the majority opinion did not answer this question, doesn't that indicate that a majority of the Court would be open to the possibility, if properly framed, of an affirmative defense? Thomas is sixth?

Mr. FELDMEIER. Yes, Justice Thomas was the sixth Justice. There were five Justices that briefly addressed the affirmative defense and said if this defense—or if this issue of proving a real minor is so difficult for the Government, with its seemingly infinite resources and manpower, how then can we then shift it to a defendant, who in many cases is indigent, does not have access to the databases, does not have access to the diplomatic efforts that the Government often uses to obtain witnesses from overseas, does not have all of the resources at his or her disposal that the Government has, how is he or she going to meet this affirmative defense? It's unrealistic for the Government to throw up its hands and say it's too difficult for us to prove an actual child, let the defendant do it.

But the reality is that there isn't a compelling interest shown. I have yet to see a single case where a defendant charged with possessing actual child pornography successfully raised this virtual child defense and was acquitted by the jury. I don't see any cases, much less a compelling number of cases, to justify this shift of the burden.

Mr. SCHIFF. I want to make sure we get at least a little time on the de novo review issue.

Mr. COBLE. Very—the gentleman's time has expired, but if you could answer that very quickly.

Mr. FELDMEIER. I'm sorry, Congressman?

Mr. SCHIFF. The question of why do we find departures in this area. Should we allow de novo review change the standard on departures in the Sentencing Guidelines?

Mr. FELDMEIER. Well, let me first say, having handled a few child pornography cases as a defense attorney, it has not been my experience that district court judges downwardly depart. It's been the opposite.

But having said that, if we begin—it's our position that if we begin to piecemeal review decisions of the district court in particular areas regarding downward departures, and in those areas that we disagree, we begin to cut off the discretion afforded district courts, that we undermine the very purpose of sentencing, and that is to allow, with some built-in provisions for equity, ultimate discretion to the court even within the guidelines.

Mr. COBLE. The gentleman's time has expired.

The gentleman from Wisconsin is recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chair.

Mr. Collins, I'd like to give you an opportunity to respond. Mr. Feldmeier argues that the pandering provisions in 1161 are unconstitutional. Could you explain briefly how those provisions work and whether or not you disagree or agree with Mr. Feldmeier's conclusion? And, also, if you would, comment on Mr. Feldmeier's conclusion on the definition of child pornography.

Mr. COLLINS. Yes, Congressman Green. With respect to the pandering provision, the problem with the prior pandering provision that the Court found is that it treated the underlying material as prohibited based on how it was advertised. The current approach here is to focus on the advertising itself. So if someone is out there on the Internet hawking child pornography, saying "I have the real thing," he's doing one of two things: either he does have the real thing, in which case his advancement of that and advertising of it is concededly something that can be prohibited; or he's engaged, frankly, in a species of false advertising, which is also not protected by the First Amendment.

So either way, whether he has the real thing or not, that kind of pandering and advertising on the Internet does not involve protected speech.

With respect to the underlying definition of child pornography, as Congressman Schiff noted, the Court explicitly left open this question. They did not decide whether a different affirmative defense with a narrower provision would be constitutional. We don't know whether or not among the five Justices that reservation was critical to one or more of them. But we'll take them at their word. This bill would cure the two deficiencies that are specifically noted, but it doesn't stop there. It goes further and cures the underlying substantial overbreadth in the original provision, by having a narrower definition of sexually explicit conduct, by limiting it to the medium that gives rise to the practical proof problem, which is computer-generated and digital images, and also, as Congressman Schiff noted, has about as narrow a definition of indistinguishable as can reasonably be had in the area.

Mr. GREEN. Thank you. Let me switch gears on you quickly. With respect to the other legislation, one set of provisions in there deals with the two-strikes provisions that cover repeat child molesters. As I understand your written testimony, the only concern that you appear to have with those provisions is that you believe that perhaps we should cover more crimes than this would do.

Mr. COLLINS. That's correct, and we understood the intent of this provision to be comprehensive so that like things are treated alike, and we basically pointed out in the written statement that there was a little bit of underinclusion there and a more consistent approach was laid out in the proposal we suggested there.

Mr. GREEN. So it would be your preference that we actually at some point try to amend this legislation by adding more crimes to be covered by the two-strikes provisions?

Mr. COLLINS. That would be the net effect of it. I have not laid them side by side to see whether there is something on the 1104 list that was not on the proposal that we had submitted. But essentially that is the gist of the Department's comment.

Mr. GREEN. Thank you. I have no more questions, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I thank the Ranking Member as well for his yielding this time. It's a very difficult question when you begin to analyze how valuable our children are and what they're worth in terms of providing the laws and the strictures to protect them.

I happen to be supportive of the overall value that, with restraints of the Constitution or with respect for the Constitution, that we should be as diligent in passing legislation that will pass constitutional muster, that will protect the children, with respect for the understanding that we have a criminal justice system guided by constitutional guidelines.

So let me first start with 1104, which is the bill dealing with abductions, and find out about some—and I'm going to ask Mr. Collins in terms of these as added tools for—I guess what we always want to do is to have a law that is sufficiently prohibitive or sufficiently strong to send out a signal that we will not tolerate these kind of heinous acts. And certainly I think the abduction of a child, the ultimate death of a child through abduction, or any manner like that is reason enough to have a strong law.

But I would ask the question—I noticed that there is a provision in this legislation, discretion to extend the term for supervision of released sex offenders for up to a maximum of life. Can you explain that as a preventative measure and whether or not that is something that truly is necessary for the legislation? Would you also explain the issue dealing with consensual offenses, which, as parents, we would not applaud, but certainly if consensual offenses between teenagers, how does that help the legislation—legislative approach, which is to prevent abduction of children? And also the aspect of the four new wiretaps, how does that help? If you can explain how that enhances the bill more effectively than if we had it as a straight-up AMBER Alert bill?

Mr. COLLINS. Yes, Congresswoman. With respect to the lifetime supervision, I would note that what the bill does there is raise the statutory maximum on supervised release. It doesn't require lifetime supervised release in all cases, and indeed with the maximum increase, it would be subject to the control of the Sentencing Commission to prescribe recommended ranges in the ordinary cases.

But that reform is certainly justified by what we all, I think, know too well is the very high rate of recidivism in sexual offenses,

that they have an unusually high rate of recidivism when compared to other cases.

Ms. JACKSON LEE. So that goes to recidivism? I mean, that's what you think that——

Mr. COLLINS. Right, but there's a continued need. Unfortunately, many people who are sexual offenders are in need of some longer-term treatment that goes beyond the 5-year maximum, and that's the statutory maximum in current law, much less what the guidelines would prescribe as an ordinary term of supervised release in some cases. They need help and, frankly, supervision beyond the 5-year period, and this bill would make that possible, subject, again, to the guiding discretion of the Sentencing Commission as to what the appropriate ranges would be and when a life range might actually be warranted.

With respect to the coverage of statutory rape, the bill is largely neutral in leaving current law, in terms of the definition of the offense, where it is. It changes the circumstances in which it may be applicable and then also has—in terms of increased penalties, does have some treatment there. But the basic elements of when statutory rape within Federal jurisdiction is applicable is consistent in this bill with current law and doesn't change the substance of that underlying crime.

Ms. JACKSON LEE. And that's responding to my point about consensual sex between teenagers?

Mr. COLLINS. That's correct. There is an existing statutory rape provision in Federal law, and that is cross-referenced and borrowed in this provision. For example, in the sex tourism provision, section 105 would make—by borrowing the definitions of offenses in chapter 109A, which would include that, it carries that over into this context. But that's already the Federal law in the narrower context in which it already applies. This just extends it into the sex tourism context as provided in 105.

And then with respect to wiretaps, I think we all understand that with the rise of the Internet, the use of the Internet to lure children is a serious problem, and so the need for wiretap authority with respect to the range of offenses enumerated here is clearly warranted.

Ms. JACKSON LEE. Mr. Chairman, I'd like—I see there's a different color. I'd like to ask the Chairman for an additional minute.

Mr. COBLE. Well, your time has expired, but without objection, one additional minute's granted.

Ms. JACKSON LEE. I appreciate it. I'd like, Mr. Feldmeier, if I could, to move to the child pornography legislation and this dilemma that we have with the *Ashcroft* v. *Free Speech* legislation—excuse me, decision that we had that really causes you to grapple, because it is a question of thought versus actions.

Give your viewpoint as to what would be the more narrowly structured response to someone who would be engaging in child pornography Internet usage, and in order to be preventive and to penalize those who are engaged in child pornography, that it is very difficult to separate out those who are using the virtual images. Why should we preclude that? Why can't we fix that narrowly to conform with *Ashcroft* v. *Free Speech Coalition* and have—what

we want to do is prevent that kind of abuse of children in the first place.

Mr. FELDMEIER. Congresswoman, I would first challenge again the Government's assumption that this is a problem that is incapable of being identified by Federal law enforcement officials. I think, at least in my experience, they have been very successful in identifying and separating the so-called virtual materials or the computer-alterated real materials from the real child pornography.

With that being said, they do have considerable resources. In a recent case that I participated in, in Dayton, I learned from the Government that they have scanning capability to take an image, an existing, targeted, charged image and compare it to large databases of previously identified actual child pornography so that they can root out the real child pornography from the so-called virtual child pornography. So I believe that there are several resources already in place to accomplish what the Government seeks here.

Mr. COBLE. The gentlelady's time has expired.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Mr. COBLE. You bet.

The gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman.

Mr. Sullivan, could you give me an example of a 12-year-old child legally consenting to a sexual act with an adult?

Mr. SULLIVAN. No.

Mr. FEENEY. Well, on page 5 of your testimony, among other things, you condemn section 101 of the bill because it includes as one of the offenses what you referred to as "consensual acts with underage victims," and, of course, that section defines underage as between 12 and 15. So, in fact, legally there is no such thing as a consensual act between a 12-year-old and an adult that would be a sexual act.

Mr. SULLIVAN. In terms of a legal proposition, obviously that's consent—that is statutory rape. Consensual in terms of a lay definition of consent, can a 19-year-old senior in high school consent to have sex with a 15-year-old freshman? Yes. Is that affirmative defense under law? No, it's not. That sentence trades on the sentiment that your colleague, Congresswoman Jackson Lee, stated earlier. It may not be desirable, but teenagers do have sex. So the question is one of proportion and not one of whether—my point is not that it is legal or should be legal, but that the potential lifetime of supervision for an act between teenagers who, in fact, consent, even if that consent is not recognized under law.

Mr. FEENEY. Well, I'd like to point out that nothing's truer than that which is true by hypothesis, and it was my hypothesis to use a 12-year-old with an adult, which is within your testimony. One of the reasons you oppose the bill is it may require a lifetime supervision.

But, Mr. Feldmeier, I've got a question or two of you, as well. Is it your position and is it the Free Speech Coalition's position that the First Amendment prohibits Congress from enacting any legislation that would outlaw virtual pornography?

Mr. FELDMEIER. To the extent that the Supreme Court has made it clear that non-obscene images of adults or fictional children is protected under the First Amendment, that is correct. I haven't

seen a proposal yet targeting the so-called virtual child pornography that would pass constitutional muster. So in light of the Court's precedent, I would have to say no.

Mr. FEENEY. Well, actually, you've gone further. In your testimony on page 4, you say that "Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct by actual children." So your position is pretty definitive that no virtual activity can ever be proscribed, at least with respect to your written testimony. So I'd like to give you a hypothesis as well, and unlike Mr. Sullivan, I hope you'll allow me the flexibility of creating my own hypothesis.

Would it be constitutionally protected speech if somebody came through my neighborhood and took photographs or pictures, for example, of my 4-year-old son and then was able, through digital technology or other technology, to basically develop a photograph or a movie whereby, using virtual imagery, we would see photographs or movies of my child being horrendously abused sexually, perhaps decapitated or otherwise murdered or horribly physically abused? And if that sort of material ends up in my mailbox, is that absolutely guaranteed, protected speech under your interpretation of the Constitution?

Mr. FELDMEIER. Absolutely not, Congressman. Under the Child Pornography Prevention Act of 1996, Congress banned the so-called morphing of identifiable children. So if you take an image of an identifiable actual child and manipulate it so that it appears that the child is engaging in sexually explicit activity, that is child pornography.

The Free Speech Coalition, in its challenge against the CPPA, did not challenge that provision because, again, it did real harm to real children. That's not the type of virtual child pornography, however, that we challenged in the CPPA or that we challenge here. We've identified wholly computer-generated——

Mr. FEENEY. Well, in fairness, of course, your testimony actually basically says we can't deal with any virtual—unless an actual child is physically abused, which in my hypothesis would not occur, so you've actually altered a little bit from your testimony. But, you know, you're describing the actual dictum, the footnote in the Ferber case. But describe for me the difference in the actual harm to the child in the scenario I gave you and what you are fighting against here in terms of virtual photos of the same child that are not actually morphed.

Mr. COBLE. The gentleman's time has expired, but I'll allow one additional minute.

Mr. FELDMEIER. If it's a virtual child, there is no actual child depicted, so there would be no harm to an actual child. In your hypothetical, there was a real child, your neighbor's child, whose image may have been altered to a certain degree, but it still would be identifiable by the average viewer and, therefore, could lead to abuse, ridicule, blackmail, and other types of activity that is harmful to that real child.

Mr. FEENEY. Well, thank you for the additional minute. I'll close with this: Well, actually there are capabilities of good artists to do just as good a job duplicating the image of an individual, with or without morphing. So I still don't understand the difference in the

actual harm to the child, whether it's developed through morphing or simply through artistry or the high-tech capabilities that are available.

Mr. FELDMEIER. If I may answer, Mr. Chairman?

Mr. COBLE. Very well.

Mr. FELDMEIER. Again, any manipulation of an image of an actual child to make it appear that that child, that actual child, is engaging in sexually explicit activity constitutes child pornography under 2256(8)(c), a provision that withstood, because it was not challenged, the decision in the Free Speech Coalition. And so that actual child would be protected.

Mr. COBLE. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Let me just follow up on that.

If the material is obscene, is it proscribed under current law?

Mr. FELDMEIER. It's our understanding that it is, Congressman.

Mr. SCOTT. Is obscenity illegal?

Mr. FELDMEIER. Yes, it is.

Mr. SCOTT. Okay. If it's not obscene but it's pornographic, using real children, is it illegal?

Mr. FELDMEIER. Yes, that is our understanding.

Mr. SCOTT. So what we're talking about is not obscene, not using real children.

Now, what did *Ashcroft* v. *Free Speech Coalition* say about the legality of not obscene, not using real children? What did the Court say?

Mr. FELDMEIER. It affirmed that that material was protected under the First Amendment, in essence, reaffirming the decision of 20 years prior in the Ferber matter.

Mr. SCOTT. Okay. Now, Mr. Collins, you indicated—cited Justice Thomas' concurring opinion that on the point you cited was the minority opinion, that if it's indistinguishable, you still ought to be able to prosecute it. Isn't it true that there were five Justices out of nine that did not agree with that decision, they went to great lengths to tell you every different kind of way you could, that if a real child was not involved at all in the production of the material, that unless it was obscene, it was not illegal?

Mr. COLLINS. No. The comment from Justice Thomas that I was referring to is his comment about the majority opinion. He says, and I quote, "The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality." And then he cites the relevant page, the point that was quoted by Congressman Schiff about "we need not decide..." And then he says that the Court thereby "implicitly accepting that some regulation of virtual child pornography might"——

Mr. SCOTT. Can you cite anything in the majority opinion that cites the compelling interest that does not involve children, that you could proscribe non-obscene material that does not involve children? Don't they go page by page, the five of them, in their own language telling you you can't proscribe that?

Mr. COLLINS. No. What the Court did in part two of its decision was address the categorical exclusions. Obscenity is totally outside

the First Amendment. Ferber's totally outside the First Amendment. Those categorical exclusions couldn't save this statute.

Then in part three of the decision, it then turned to the compelling interest analysis by saying the Government puts forward a number of interests as justifying this prohibition, and then it went through those. And on the relevant one here about prosecutorial difficulties, it stated that the—its holding was that the statute failed because the affirmative defense was insufficient. That is the holding of the case.

Mr. SCOTT. Well, I mean, it also said in the question of difficulty—difficulty of shifting the burden of proof—that you create serious constitutional difficulties, the affirmative defense applies only after the prosecution has begun, the speaker must himself prove, on the pain of conviction, that his conduct falls within the affirmative defense in cases under CPPA, evidentiary burden is not trivial. Is any of that solved in this statute?

Mr. COLLINS. I believe it is, in the sense that the Court made those comments with reference to a provision whose underlying breadth was much greater than this bill.

Mr. SCOTT. Does this apply—does this bill apply to works created before 1996?

Mr. COLLINS. The bill here would apply to works created before 19——

Mr. SCOTT. The statute, they say, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. They go on to say that it provides no protections because the affirmative defense would not bar a prosecution because an affirmative defense only comes after the prima facie case is offered.

Does the prima facie—does the statute provide for the prosecution of people who are guilty of virtual child pornography?

Mr. COLLINS. The statute defines an offense that prohibits a very narrowly defined class of images. Much narrower.

Mr. SCOTT. Does it say that you can be convicted of virtual child pornography, that the case in chief presented only has to present that it is indistinguishable, leaving a reasonable doubt as to whether it's distinguishable or not? And can you get a conviction on that?

Mr. COLLINS. It defines the elements in such a way——

Mr. COBLE. Pardon me, Mr. Collins. The gentleman's time has expired. We'll give you one extra minute, Bob.

Mr. SCOTT. Thank you.

Mr. COLLINS. It defines the elements in such a way as to remove as an element of the case in chief the requirement that the Government prove the history or etiology——

Mr. SCOTT. Prove that a real child was involved, that the case in chief—the Government does not have to prove beyond a reasonable doubt that a child was involved. Is that right?

Mr. COLLINS. That is correct.

Mr. SCOTT. Okay. Mr. Feldmeier, you mumbled something about a court case and attorney's fees. In the case of *Free Speech Coalition* v. *Ashcroft*, this very case that showed that you could not get convictions without real children, the plaintiffs asked for attorney's fees, and the Court said, "Unless the United States carries its burden to show its position was substantially justified in law, in fact,

they get attorney's fees." Did the Court say in its order that this order finds that there was not a solid constitutional basis for the statute as written in the first place and that the scope of the CPPA was not justified in substance or in main; consequently, this order holds that the Government has not carried its burden to show substantial justification and ordered attorney's fees?

Mr. FELDMEIER. To the best of my recollection, Congressman, that's true.

Mr. SCOTT. Mr. Chairman, I'd ask unanimous consent that the order in the United States District Court for the Northern District of California in the Free Speech Coalition case be entered into the record so that others can see what the court said and also two letters on cases from the ACLU.

Mr. COBLE. Without objection.

The gentleman's time has expired.

The gentleman from Florida, Mr. Keller.

[No response.]

Mr. COBLE. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Collins, would you like to respond to that question just posed by the gentleman from Virginia regarding attorney's fees?

Mr. COLLINS. Yes. My understanding is that the decision was rendered in February, so it was just recently. I don't understand—I don't know yet whether it has been reduced to a final judgment and has been submitted to the Solicitor General's office for review. I certainly would question the notion that it was not substantially justified in light of the fact that I believe at least four circuits had upheld the constitutional of the act prior to the Supreme Court's ruling, which would suggest that there was a substantial basis if four circuits had upheld it.

Mr. GOODLATTE. Thank you very much. I have no further questions.

Mr. COBLE. I had to go speak to a constituent, Bobby.

Thank you, gentlemen, for your—well, this concludes the hearing, gentlemen. Thank you very much. As I said, we will re-examine your testimony. We may be visiting with you again before this session concludes, but I thank the Members for being here, and this will conclude the hearing.

[Whereupon, at 3:15 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Today, the Subcommittee on Crime, Terrorism, and Homeland Security examines H.R. 1104, the "Child Abduction Prevention Act," and H.R. 1161, the "Child Obscenity and Pornography Prevention Act."

This Subcommittee held hearings and reported both these bills out favorably the last Congress. The "Child Abduction Prevention Act" passed the House on October 8, 2002, by a recorded vote of 390 yeas to 24 nays, and the "Child Obscenity and Pornography Prevention Act" passed the House on June 25, 2002 by a vote of 413 yes to 8 nays, and 1 present.

The recent wave of high profile child abductions that has swept our nation illustrates the tremendous need for the Child Abduction Prevention Act. An understandable helplessness has grasped the nation, as these monsters breach the security of our homes to steal, molest, rape, and kill our children. Action is necessary and must be immediate.

The Child Obscenity and Pornography Prevention Act is necessary to stop a proliferation of child pornography after the April 16, 2002 Supreme Court decision in *Ashcroft* v. *the Free Speech Coalition*[1] in which the Court found two of the definitions for child pornography in the current Federal statute to be overbroad and therefore unconstitutional.

Child molesters are emboldened these days. Sexual exploitation of children, a prime motive for kidnapping, is on the rise. When it comes to sexual exploitation, abduction, rape, and murder of children, the United States must have a zero tolerance policy. Our children are not statistics, no level of abductions is acceptable.

These bills will send a clear message that those who sexually exploit, abduct, and harm children will not escape justice. H.R. 1104, the "Child Abduction Prevention Act" strengthens penalties against kidnapping; subjects those who abduct and sexually exploit children to the possibility of lifetime supervision; aids law enforcement to effectively prevent, investigate, and prosecute crimes against children; and provides families and communities with immediate and effective assistance to recover a missing child.

H.R. 1161, the "Child Obscenity and Pornography Prevention Act of 2003," ensures the continued protection of children from sexual exploitation. In response to the Supreme Court decision, this bill narrows the definition of child pornography, strengthens the existing affirmative defense, amends the obscenity laws to address visual depictions of pre-pubescent children and minors, creates new offenses against pandering visual depictions as child pornography, creates new offenses against providing children obscene or pornographic material, provides *de novo* review for sentencing below the applicable range under the Federal sentencing guidelines, and assists law enforcement officials in investigating sex crimes against children.

Sexual exploitation and abduction of a child is a parent's worst nightmare. These bills guarantee that individuals who attempt to and do harm a child, will receive severe punishment and will not slip through the cracks of the system to target other children.

Those who abduct children are often serial offenders, who have previously been convicted of similar offenses and those who possess child pornography often molest children. Sex offenders and child molesters are four times more likely than other violent criminals to recommit their crimes. This number demands attention, and both bills address this problem.

---

[1] 122 S.Ct. 1389 (2002).

Passage of the bills will also increase support for the National Center for Missing and Exploited Children, the nation's resource center for child protection. The Center assists in the recovery of missing children and raises public awareness on ways to protect children from abduction, molestation, and sexual exploitation.

I appreciate the witness' time and effort and look forward to his testimony.

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, thank you for holding a hearing and markup of the Child Obscenity and Pornography Prevention Act. And thank you for the work you have done on this issue.

This bill was reported out of this Subcommittee last year and passed the House by a vote of 413–8. It continues to receive strong bipartisan support.

Last year, the Supreme Court declared unconstitutional a 1996 federal law that criminalized the possession of "virtual" child pornography. This decision has weakened law enforcement's ability to eliminate the traffic in child pornography. It essentially requires the Government to prove a child is real before it can prosecute. Defendants are using the decision to argue that the depiction could be virtual, which requires the government to prove the child is real.

Child pornographers will escape prosecution unless we close the loophole. This bill will do just that.

The bill, which passed the House last year but was not taken up by the Senate, will fix this problem by narrowing the prohibition by strengthening the laws on "virtual" child pornography in order to withstand constitutional review.

It will allow defendants to prove that an image was produced without using real children.

Further, the bill will prohibit offers to sell or buy "real" child pornography, obscenity involving pre-pubescent children and minors, and the showing of pornography to children.

I urge my colleagues to support this legislation.

LETTER FROM THE AMERICAN CIVIL LIBERTIES UNION REGARDING H.R. 1104

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738

March 11, 2003

The Honorable Howard Coble
2468 Rayburn House Office Building
Washington, DC 20515-3306

The Honorable Robert C. Scott
2464 Rayburn House Office Building
Washington, DC 20515-4603

Re: **H.R. 1104, the Child Abduction Prevention Act**

Dear Chairman Coble and Ranking Member Scott:

We urge you to vote against H. R. 1104, the Child Abduction Prevention Act in its current form. The bill is scheduled for a hearing and subsequent markup in your committee on March 11, 2003. We suggest some amendments and deletions below.

We do not oppose Title III of the bill which expands the Amber Alert and improves the National Coordination of Amber Alert Communications -- communications that occur in the wake of child abduction. This portion of the bill sets minimum standards for states and provides for grant money.

The remainder of the bill, however, contains many ill-advised criminal justice provisions:

- **Expands the Death Penalty:** Section 102 expands the type of homicide that can be punished by the death penalty. The ACLU opposes the death penalty in all circumstances and opposes creating new death-eligible offenses. The increasing numbers of innocent people released from death row illustrate the fallibility of the system. We urge you to delete this provision.
- **Increases Mandatory Sentences:** Sections 103 (b) and 104 (b) increased certain mandatory minimum sentences for a number of sexual abuse crimes. The ACLU opposes mandatory sentencing because it eliminates judicial discretion and can lead to unfair punishments. We oppose increasing mandatory sentences. We do not oppose section 103 (a) that increases the maximum penalty, because this section maintains judicial discretion. It allows harsh punishments when appropriate, but allows the judge to deviate from that punishment if appropriate. However, we recommend that Congress refer this matter to the United States Sentencing Commission with directions to increase

the sentences if appropriate. The Federal judiciary opposes mandatory sentencing and has repeatedly urged Congress to refrain from expanding mandatory sentencing. For these reasons, we suggest you reject the provisions dealing with mandatory minimum sentences.

- **Criminalizes Traveling with a criminal intent:** Section 105 (b) creates a new crime of "traveling with intent to engage in illicit sexual conduct." This would apply to United States citizens or aliens who moved and travel abroad, or in interstate commerce, to engage in sexual behavior that is illegal under federal law, but not necessarily in that jurisdiction. It also applies to people entering the United States that engage in illicit sex. Because there is no requirement that the person actually engage in an illegal sexual act, there is a real danger that the government may prosecute innocent behavior and/or thought. While the government may have a legitimate interest in prosecuting sexual conduct and foreign places (section c), it is dangerous for the government to prosecute a person for traveling with *intent* to engage in a sexual act. Furthermore, a person's sexual conduct is highly private and the government will of necessity have to intrude on private matters to prove this crime -- telephone conversations, e-mail exchanges, and travel-related purchases. Another concern is that sub-section (e) requires punishing an attempt or a conspiracy to travel with the intent to engage in illicit sexual conduct to the same degree as the underlying offense. Again, the danger here is that the government will be turning wholly innocent behavior into a crime. For example, behavior such as contacting a travel agent to make travel plans could be either attempt to travel with intent or conspiracy to travel with intent to engage in illicit sexual conduct. We urge you to delete Section 105(b) and (e).
- **Two Strikes and You're Out:** Section 106 again, creates a mandatory life sentence for certain sexual offenses. Again, we oppose this section because we oppose mandatory sentencing. Some situations may merit a life sentence to punish serial sexual offenders, and judges already have the authority to impose life penalties for these crimes if appropriate. However, removing judicial discretion may create unduly harsh sentences. For this reason, we request that you delete Section 106.
- **Expanding Wiretap Authority:** Section 201 expands the federal wiretap law to include several new offenses. We are concerned about expanding federal wiretap authority in general, because wiretap authority is supposed to be used sparingly for the most serious crimes. We understand the government's desire to expand wiretap authority in some sex crimes, but think there should be differentiation between sexual offenses that involve actual children and offenses that involve transporting pornographic materials, not children. Two of the sections, 18 U.S.C. sections 2252 and 2252A involve transportation of materials and we oppose expanding wiretap authority to cover these two sections. This section should be limited to sexual offenses that involve actual children.
- **Eliminates the Statute of Limitations:** Section 202 eliminates the statute of limitation for ANY sexual abuse case (Chapter 109A offenses) even those against adults. Many of these offenses are not among the most serious felony offenses and do not justify the extreme measure of eliminating the statute of limitations. If this section were truly to be limited to only child abduction cases, it would be much less troubling.
- **Eliminating Pre-Trial Release:** Section 221 eliminates the presumption of bail for persons charged with certain crimes against children. The ACLU opposes eliminating the constitutional right to bail for persons accused of crimes, at a time when they are still

presumed to be innocent. There may be times when, for public safety reasons, a judge believes that certain offenders should be detained pre-trial. In those cases, a judge can set a high bail, making it impossible for an accused person to be released from jail. However, as with sentencing decisions, the judge should exercise discretion over bail decisions, not Congress. Section 221 should be eliminated.

While Title III of the bill is not objectionable, the provisions of the bill discussed above are problematic. Absent the amendments we suggest, we urge you to reject H.R. 1104. Thank you for your attention to this important issue.

Sincerely,

Laura W. Murphy
Director

Marvin J. Johnson
Legislative Counsel

LETTER FROM THE AMERICAN CIVIL LIBERTIES UNION REGARDING H.R. 1161

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738

March 11, 2003

The Honorable Howard Coble
2468 Rayburn House Office Building
Washington, DC 20515-3306

The Honorable Robert C. Scott
2464 Rayburn House Office Building
Washington, DC 20515-4603

Re: **H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003**

Dear Chairman Coble and Ranking Member Scott:

H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003 is scheduled for a hearing and markup in your sub-committee on March 11, 2003. While the bill is an improvement over last year's bill, H.R. 4623, it is still constitutionally problematic. This may limit its effectiveness in addressing child pornography. We therefore urge you to reject H.R. 1161.

As you know, last year, the United States Supreme Court in *Ashcroft v. Free Speech Coalition,* held that "virtual" child pornography in which no actual children were used to produce the material, is protected under the First Amendment. H.R. 1161 attempts to address *Ashcroft*. While it is more narrowly tailored than the prior attempt, it still falls short of the mark.

- **H.R. 1161 imposes criminal liability on people who possess or produce material protected by the First Amendment.**

H.R. 1161 continues to define as child pornography "virtual child pornography" (protected speech) instead of limiting its application to pornography that uses actual children (unprotected speech).

H.R. 1161 defines child pornography as a visual depiction that is, "or is indistinguishable" from "that of a minor engaging in sexually explicit conduct." (Section 3). Thus, for purposes of this section, it is irrelevant whether an actual child was used in the production of the material, so long as it is "indistinguishable" from that of a real child.

In *Ashcroft v. Free Speech Coalition,* the Court identified the governmental interest in the Child Pornography Prevention Act (CPPA) as protecting *actual* children from exploitation. For that

reason, the provisions of the CPPA prohibiting "virtual" child pornography were held to be overbroad and not narrowly tailored. The Court noted "the CPPA prohibits speech that records no crime and creates no victims by its production." *Ashcroft* at 1403.

Like the CPPA, H.R. 1161 prohibits material that records no crime and creates no victims by its production. The term "indistinguishable" is apparently lifted from Justice O'Connor's concurrence in *Ashcroft* where she discusses images that are "virtually indistinguishable." Her position, however, did not receive endorsement by the majority. To the extent that the material does not depict an actual minor, it is protected speech under the First Amendment. Furthermore, prohibiting material that is indistinguishable from that of an actual minor ignores both *Ashcroft* and *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Court relied on the distinction between actual and virtual child pornography as a basis for its holding: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.* at 763. Thus, the Court explicitly endorsed using older individuals who appear to be minors, and simulation as a means of producing material without using actual minors.

This bill punishes depiction of wholly fabricated images in which no child was used to create the image. Because H.R. 1161 subjects to liability those who possess and depict both actual and "virtual" child pornography, it is overbroad and likely to be found unconstitutional.

H.R. 1161 continues this error in Section 5. Section 5 creates a new 18 U.S.C. §1466A, entitled "Obscene visual depictions of young children."[1] Although that is the title of the new section, nowhere does the text of the proposed statute require that the material actually be obscene. The prohibition is on possessing or distributing a "visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct." Since obscenity is not an element of the offense, virtual images are also prohibited, running afoul of *Ashcroft*.

Merely defining the prohibited material as involving a pre-pubescent child involved in sexually explicit conduct does not equate to obscenity. The United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), defined obscene material with reference to a 3-part test: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 25. Only if all three elements are present may the work be deemed obscene. The proposed 18 U.S.C. §1466A omits all reference to these requirements, or the term "obscenity," meaning it does not comport with the law of obscenity. Given that the United States

[1] Child pornography involving the use of actual children may be prohibited whether or not it is obscene. Because *Ashcroft* held that "virtual" child pornography is protected speech, it may only be prohibited if it is otherwise obscene.

Supreme Court has repeatedly, and as recently as April of last year, affirmed *Miller*[2], this omission creates serious doubts about the constitutionality of this provision.

Section 5 also proposes to create a new 18 U.S.C. §1466B, entitled "Obscene visual representations of sexual abuse of minors." The statutory text *does* require that the material be obscene. However, to the extent that obscenity is already proscribed, this section appears superfluous.

- **The "pandering" provision sweeps in non-commercial speech, making it overbroad.**

H.R. 1161 prohibits providing or selling a visual depiction to another that is advertised or described as containing a visual depiction of an actual minor engaging in sexually explicit conduct. It then prohibits receiving material that the receiver believes to contain such a visual depiction. In *Ashcroft*, the Supreme Court extensively discussed "pandering" as an offense, and advocated restricting such provisions to commercial exploitation.[3]

In *Ashcroft*, relying on *Ginzburg v. United States*, 383 U.S. 463, 474 (1966), the Court noted that "[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test." "Where a defendant engages in the 'commercial exploitation of erotica solely for the sake of their prurient appeal,' *Id.* at 466, the context he or she creates may itself be relevant to the evaluation of the materials." *Ashcroft* at 1406. In noting difficulties with the CPPA pandering provision, the Court noted "the statute. . .does not require that the context be part of an effort at 'commercial exploitation.'" *Id.* Thus, while pandering may be relevant in determining whether material is obscene, it should be limited to instances of commercial exploitation. Failure to so restrict the pandering provision in H.R. 1161 renders it constitutionally questionable.

A further problem involves H.R. 1161's punishing offering, providing, or selling material "with the intent to cause any person to believe that the material is, or contains a visual depiction of an actual minor engaging in sexually explicit conduct." This provision allows punishing distribution of material that may well be protected speech, merely because of the way it was marketed. For example, if someone offered to provide you with a copy of Disney's Snow White, but represented to you that it contained scenes of actual children involved in sexually explicit conduct, that person could be criminally prosecuted, and you could go to jail for receiving that material, even though Snow White is clearly protected under the First Amendment.

---

[2] *Miller* was most recently reaffirmed by *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), in which the Court struck certain provisions of the Child Pornography Protection Act (CPPA), partly on the basis that the act covered works regardless of whether they appealed to the prurient interest, or whether the image was patently offensive, or whether it had literary, artistic, political, or scientific value.

[3] Non-commercial speech currently receives greater protection under the First Amendment. Commercial speech is still protected under the First Amendment, however restrictions on such speech are reviewed by the Court with a more lenient standard. *See Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

The Supreme Court noted in *Ashcroft*: "The determination [regarding pandering] turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way." *Ashcroft* at 1406. Similar to *Ashcroft*, H.R. 1161 focuses on how the speech is presented rather than on what is depicted, and is devoid of findings regarding the harm posed by images that are simply pandered as child pornography.

- **H.R. 1161 chills protected speech because it places the burden on the defendant to prove the material was produced without using a child.**

H.R. 1161 provides an affirmative defense (in Section 3) to various offenses, including mailing or transporting child pornography and possession. Unfortunately, few defendants will be able to avail themselves of the defense, even if they are innocent of the charges. Normally, only the producer of the material will be in a position to meet the burden of proof. Subsequent possessors or distributors are unlikely to have the records to meet that burden.

In *Ashcroft*, the government attempted to argue that the CPPA was not a measure suppressing speech but instead was a law shifting the burden to the accused to prove the speech was lawful. The government relied on the affirmative defense that allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. The Court noted in this regard:

> *The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.* An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover applies to work created before 1996, and the producers themselves may not have preserved records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction. *Id.* at 1404-1405. [Emphasis added.]

The affirmative defense provided in H.R. 1161 suffers from the same infirmities. It covers possession offenses in which the possessor may have no ability to avail himself of the affirmative defense. For example, one may possess a work that someone else produced completely by computer[4], involving no real children, yet have no ability to prove that in court. The bill also imposes criminal liability on those who created material before the effective date of

[4] The Supreme Court held in *Ashcroft*, that virtual child pornography is protected under the First Amendment.

the statute, which means even the producers may not have preserved the records necessary to meet the burden of proof.

Because the affirmative defense may lead to conviction of innocent possessors or distributors, the Supreme Court may find it unconstitutional. While the Court did not rule in *Ashcroft* that shifting the burden of proof to the accused was *per se* unconstitutional, it did acknowledge the "serious constitutional difficulties" in doing so.

- **H.R. 1161's extraterritorial jurisdiction provisions may result in other countries imposing liability on U.S. companies for their speech, even though that speech is protected under the First Amendment.**

H.R. 1161 provides for extraterritorial jurisdiction where the defendant intends that the material be transported to the United States, or where the defendant "makes it available within the United States." This, unfortunately, will provide support for other countries that wish to exert jurisdiction over entities in the United States who make material available on the World Wide Web that violates the law of the other countries, yet is protected speech in the United States.

Internet Service Providers in the United States were outraged when France exercised jurisdiction over Yahoo! US based solely on its posting information on the World Wide Web that was not targeted at France. France prohibits the sale of Nazi memorabilia. Although Yahoo! had a French office which abided by French law, Yahoo! US operated in the United States. Yahoo! US had Nazi memorabilia for sale on its auction site. Simply because French citizens could access Yahoo! US, France brought an action against Yahoo! US for violating French law. A U.S. court has held that France may not bring an action in the U.S. to enforce the judgment, and that Yahoo! US was protected under the First Amendment. The case is working its way through the appeals process.

Once an item is posted on the World Wide Web, it is available to anyone, anywhere in the world, regardless of the poster's intentions.

H.R. 1161 prohibits transporting a "visual depiction to, or otherwise makes it available within, the United States, its possessions, or territories, by any means, including by computer or mail." Thus, if someone in Zimbabwe posts child pornography on the World Wide Web, it is *accessible* in the United States, regardless of the poster's intentions. Section 7 only requires intent that the material be transported to the United States, *or* that the material is made available in the United States. Thus, even though the poster of the material had no intention that it reach the United States, the mere fact that it is available on the World Wide Web would create liability. If mere posting creates liability, other countries could use this provision to argue they can prohibit content based in the United States and protected by the First Amendment solely because the content was available in that foreign country. For example, France could ban Nazi memorabilia from U.S. web sites, China could ban U.S. criticism of its leaders, and Saudi Arabia could ban images of bikini-clad women pictured on U.S. travel sites. First Amendment protection for U.S. entities would be stripped away solely because the speech was available in foreign countries with limited respect for freedom of speech.

- **H.R. 1161 contains ineffective mandatory minimum sentences for certain repeat offenders.**

H.R. 1161 extends existing mandatory minimum sentences to a new category of repeat offenders. (Section 8).

Chief Justice William Rehnquist has called mandatory sentencing "a good example of the law of unintended consequences," and several Members of the Senate Judiciary Committee have expressed reservations about mandatory minimum sentences. The Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective. And numerous studies, including those by the Department of Justice and the U.S. Sentencing Commission, indicate that mandatory minimum sentencing is not an effective instrument for deterring crime.

Mandatory minimum sentencing deprives judges of the ability to fashion sentences that suit the particular offense and offender. Despite their flaws, the Sentencing Guidelines are better able to take into account the range of factors that are relevant to the sentencing decision.
The Sentencing Guidelines also are better able to exclude factors that give rise to unwarranted sentencing disparities. In transferring sentencing discretion from judges to prosecutors, mandatory minimum sentences transfer the sentencing decision from open courtroom to closed prosecutor's office. Consequently, there are inadequate guarantees that statutorily prohibited factors such as race, age and gender do not influence the ultimate sentence. Even when the charging — and, in effect, sentencing — decision is free from taint, such closed-door decisions can undermine the appearance of equal justice.

We greatly appreciate the efforts made to craft a bill that will withstand constitutional scrutiny. While H.R. 1161 is certainly closer to meeting that goal than the earlier House bill, it still falls short of fully complying with *Ashcroft v. Free Speech Coalition* and raises other constitutional concerns as well.

Sincerely,

Laura W. Murphy
Director

Marvin J. Johnson
Legislative Counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREE SPEECH COALITION, On its own behalf and on behalf of its members, BOLD TYPE, INC., JIM GINGERICH, AND RON RAFFAELLI,

Plaintiffs,

v.

JOHN D. ASHCROFT, Attorney General of the United States, and the UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

No. C 97-00281 WHA

ORDER AWARDING ATTORNEY'S FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

After the Supreme Court held that the Child Pornography Prevention Act of 1996 ("CPPA"), 18 U.S.C. 2251, *et seq.*, violated the First Amendment, the Free Speech Coalition, a plaintiff herein, petitioned on remand for an award of attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412. Since plaintiffs prevailed, the EAJA presumes an award is appropriate unless the United States carries its burden to show its position was substantially justified in law and in fact. *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 498 (9th Cir. 1987).

In deciding whether the government's position was "substantially justified," both the reasonableness of the statute and the reasonableness of the government's defense of the statute must be considered. *League of Women Voters of Cal. v. FCC*, 798 F.2d 1255, 1258–59 (9th Cir. 1987). The government need not show that its position was "justified to a high degree" but,

rather, that it was "justified in substance or in the main — that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This requires more than a nonfrivolous position. The government's position must have a "solid though not necessarily correct" basis. *McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir 1983); *see also Spencer v. NLRB*, 712 F.2d 539, 551 n.44 (D.C. Cir. 1983). The fact that the government lost, however, "does not raise a presumption that its position was not substantially justified." *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988).

Initially, four courts of appeals declined to hold the statute was overbroad. Those were the First, Fourth, Fifth and Eleventh Circuits.[1] The Ninth Circuit held (2–1) herein that the statute was facially overbroad under the First Amendment.[2] With that sole exception, the "string of successes" at the circuit level before the final contrary pronouncement by the Supreme Court would ordinarily tempt a district judge to indulge a presumption that the statute had plausible constitutionality and that the government's defense had been reasonable, even if unsuccessful. In this regard, the Supreme Court has said that a "string of successes" can be objective indicia of reasonableness. *Pierce*, 487 U.S. at 569. In *Pierce*, however, the Supreme Court went on to examine the underlying merits. *Id.* at 569–71. This order will do the same.

In carrying out this assessment in this case, it is best to start with the final word by the Supreme Court. That Court's opinion (and the separate opinions) illuminated the merits and the boundaries of reasonableness more definitively and dispositively than the earlier circuit orders. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The CPPA had expanded the federal prohibition on child pornography to include not only pornographic images made using actual children but to "any visual depiction" that "appears to be" of a minor engaging in

---

[1] *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999).

[2] The Ninth Circuit order appears at *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). The Honorable Samuel Conti held that the CPPA was constitutional when the case first arose in this court. On remand, the case was reassigned to the undersigned.

sexually-explicit conduct. 18 U.S.C. 2256(8)(B). The CPPA thus proscribed virtual-child pornography produced through computers without involving any actual children as well as photographs and films using youthful-looking adults. The Supreme Court held that the CPPA thus extended to images that were not obscene under *Miller v. California*, 413 U.S. 15, 24 (1973), since, for example, the CPPA ignored any redeeming value of the work and would have even banned acclaimed film and literary works. The Court rejected the government's contention that the CPPA should be assessed under the child-pornography standard set forth in *New York v. Ferber*, 458 U.S. 747, 758 (1982). *Ferber* had relaxed the *Miller* standards as applied to actual child pornography. That decision had upheld a ban on the production, sale and distribution of actual child pornography in order to prevent exploitation of actual children. The Supreme Court in the present case, however, refused to extend *Ferber* to pornography made without involving actual children. The government made a number of policy arguments but all failed in the Supreme Court.

The Supreme Court's decision herein held without dissent that an unqualified ban on so-called youthful-adult sexual works, i.e., films and photographs using adults made up to look like children would be invalid. Although the overall vote was six to three, not a single justice was willing to hold that a categorical ban on sexually-explicit films and photographs using youthful-adult actors and models would be constitutional. The Chief Justice and Justice Scalia argued for a narrowing construction to minimize the First Amendment problem but even they seemed to recognize that otherwise the CPPA was too comprehensive. Justice O'Connor, in a separate opinion, also said it would be unconstitutional to ban youthful-adult works as, of course, did Justice Kennedy for the majority. It is rare that all nine justices would line up in this way.

Strikingly, the Supreme Court itself in *Ferber* had specifically called out the use of youthful-looking adults as well as simulations as lawful alternatives to the exploitation of children:

> As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized [footnote omitted].

> Simulation outside of the prohibition of the statute could provide another alternative.

458 U.S. at 763. This passage was relied on by the recent Supreme Court opinion to show that *Ferber* had not only referred to the distinction between actual and virtual-child pornography but had actually relied on it (in *Ferber*) as a reason to support its holding. 535 U.S. at 251.

To pause here for a moment, it is worth emphasizing that the CPPA, as written, flatly outlawed a specific scenario that *Ferber* had said would enjoy at least the protection afforded by the *Miller* standards. In the Supreme Court, all of the justices seemed to conclude that the "appears to be" provision was difficult to reconcile with the Supreme Court's own caselaw.

To continue with the statute, another genre at issue was computer-generated images. Such images also fell within the "appears to be" prohibition. In fact, "high-tech kiddie porn" has often been said to have been a main target of the CPPA. Once again, however, the Supreme Court refused to extend *Ferber* to this class of images since they did not involve actual children. Once again, the approval of "simulations," as quoted above from *Ferber*, had foreshadowed the result.

In light of the clarity of the holding in the Supreme Court, one might ask how four circuits had managed apparently to reach the opposite result and thus had generated the "string of successes" now relied on by the government. This Court has gone back to study those decisions. In doing so, it is not really so clear that the four decisions were so uniformly pro-CPPA as the government now portrays them. To be sure, all four sustained indictments or convictions in criminal cases and turned aside facial challenges to the CPPA. Those decisions, however, recognized the important First Amendment problem raised by the statute. In various ways, they then struggled to contain the problem so as to avoid a facial invalidation.

For example, the circuit decisions recognized a "troubling" risk under the First Amendment of prosecutions involving youthful-looking adult material, the problem described above. *E.g.*, *Fox*, 248 F.3d at 405. The decisions then minimized the risk by saying such prosecutions would probably be sparse, given the need for prosecutorial efficiency. Overbreadth could later be cured, the courts ruled, through a case-by-case evaluation of the facts in a given case. *E.g.*, *id.* at 406. As the First Circuit stated, "the existence of a few possibly

impermissible applications of the Act [did] not warrant its condemnation," arguing that the fringe applications could be cured on a case-by-case basis. *Hilton*, 167 F.3d at 74.

The Supreme Court disagreed sharply with any case-by-case redemption of the statute. The Supreme Court said the CPPA was "a textbook example of why we permit facial challenges to statutes that burden expression," going on to explain how the CPPA chilled a substantial amount of protected expression. 535 U.S. at 244.

In a similar way, certain circuit courts were prepared to narrowly construe the CPPA to insert a "knowingly" requirement. More specifically, they would have required the government to prove that a person charged with possession actually knew the materials contained depictions of real minors engaged in sexually-explicit conduct or computer-generated images virtually indistinguishable from real minors engaged in such conduct. *E.g.*, *Fox*, 248 F.3d at 404; *Hilton*, 167 F.3d at 75. The Supreme Court did not accept any narrowing of the statute.

What emerges from a review of the various CPPA litigations is sustained recognition that serious First Amendment problems were presented by the CPPA. No court seemed prepared to endorse its full statutory scope. No court seemed prepare to incarcerate youthful-looking adult actors or prosecutions based on them. Yet everyone, or virtually so, seemed to recognize that the words "appears to be" called for exactly that result. This engendered a struggle to rein in the statute by a narrowing construction or to postpone dealing with its excess by calling for a case-by-case approach, or even to announce future immunity for the use of youthful-looking actors.

Thus, the debate really came down to whether the unconstitutional aspects of the CPPA should be dealt with as they arose on an as-applied basis rather than on an across-the-board basis under the overbreadth doctrine. Ultimately, the Supreme Court refused to join in the struggle to save the statute from its own overbreadth. Taking Congress at its word, the Supreme Court indulged no saving construction and held the overbreadth was so substantial that a facial invalidation, rather than case-by-case adjudication, was warranted. Indeed, as stated, the Court called the CPPA a "textbook example" of why facial challenges are permitted.

Viewed in this light, the constitutional flaw in the CPPA was recognizable from the start, the only issue left for debate being how to remedy the flaw. Even if reasonable minds could differ over the latter question, the former question should not have been in doubt. And, the latter question is itself informed by the Supreme Court's judgment that the CPPA presented a "textbook example" of why we have the overbreadth doctrine. A "textbook example" means a classic example or one that should have been clear to all.

Having been dealt a poor hand, government counsel behaved in an appropriate manner in constructing nonfrivolous arguments to defend the CPPA. Their arguments were no more unreasonable than the statute they had to defend. But the fact is that the CPPA and, as a result, its defense in the courts were burdened with a constitutional flaw foreseeable from the outset.

For the foregoing reasons, this order finds that there was not a solid constitutional basis for the statute, as written, in the first place and that the full scope of the CPPA was not justified in substance or in the main. Consequently, this order holds that the government has not carried its burden to show substantial justification.

* * *

As for the amount of fees and expenses, the application seeks reimbursement for 899.40 hours at $125 per hour as adjusted for a statutory increase for cost of living as well as expenses of $14,879.55. The government has made a series of objections to the tabulation. At the present stage, the Court will rule on only one objection. The government is correct that lawyer time spent talking to the press is not compensable. As for the other objections, they are hereby referred under FRCP 54(d)(2) to a special master to be selected and whose expenses and fees shall be borne by the parties equally or in such division as the special master recommends. The parties are encouraged to settle the amount due (reserving as to the issue of entitlement),

failing which they must submit the name of an agreed-upon special master by **March 3, 2003**. After that date, the Court shall select a special master on its own.

IT IS SO ORDERED.

Dated: February 7, 2003.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California